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By Hans A. Linde\*

# Due Process Of Lawmaking

## I. INTRODUCTION

When Edward S. Corwin wrote in the 1920s about the practice of American courts to review the substance of legislation, a topic which then occupied center stage in constitutional law, he prefaced one of his articles with this quotation from Mr. Justice Holmes: "Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house."<sup>1</sup> I have seized upon this quotation in anticipatory self-defense, specifically defense against that much more famous quotation from Holmes that the life of the law has not been logic but experience;<sup>2</sup> for we are returning, a half-century later, to the same topic—the revival of substantive judicial review of legislation—and what we shall discuss will have more to do with the role of logic in the life of the law than with experience. So I am glad that the famous judge and theorist to whom we are indebted for this occasion also provided a text on the importance of theory in the dogma of the law; for our purposes, in the dogmas of constitutional law.

Holmes's celebrated observation about logic and experience opened a book on the common law, and the Constitution of the United States, I might point out, is not common law. But I do not want to beg the question. If by constitutional law one means the decisions of courts on judicial review of governmental acts, constitutional law over long periods of time indeed looks very much like common law. It is natural that judge-made formulas, once pronounced, take on a life independent of their supposed sources in the Constitution, and that the application of these judicial formulas should become the daily rule in constitutional litigation and their reexamination the exception. A generation of lawyers will cast their pleadings and arguments in terms of vested rights, or the

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1. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928), quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).  
 2. "The life of the law has not been logic: it has been experience." O.W. HOLMES, *THE COMMON LAW* 1 (1881).

original package doctrine, or direct and indirect effects, or unreasonable burdens, or clear and present danger, or overbreadth and chilling effects if these are the words that appear in Supreme Court opinions, and new opinions from the lowest to the highest courts will in turn respond in the same terms. Like common law, the accretion of constitutional case law will reflect cumulative experience, not the original logic, so much so that Justice Stone, in 1936, could celebrate the rubrics by which judges protect individual rights against government as part of the common law of the United States.<sup>3</sup>

Still, the submerged constitutional premises, unlike common law, remain in place to be rediscovered. The 1920s, a period of much scholarship about judicial review under the state and federal due process clauses, proved also to mark the end of the judge-made formulations of due process that the scholars were analyzing, which were soon to be followed by a radical reconsideration of the underlying theory. By 1939, Robert H. Jackson, then Solicitor General of the United States, could look back on the bad old days when constitutional law had grown up "case by case, into a sort of super-common-law" in which a lawyer devoted himself "to distinguishing and reconciling the language of judicial opinions, instead of grounding himself in the language and historic meaning of the Constitution itself," and he could announce with satisfaction: "We are really back to the Constitution."<sup>4</sup> That boast might be called naive if it came from someone other than Robert Jackson, or at least not unbiased, coming as it did from a New Deal Solicitor General addressing the A.B.A. section on public utility law. Still, when the wholesale reversal of a half-century of Supreme Court case law can be hailed as a return to a fixed reference point beyond the case law itself, the reminder that somewhere at the bottom of constitutional law "it is a Constitution we are expounding"<sup>5</sup> becomes important beyond the realms of academic debate. It suggests a rather different balance between the demands of logic and experience in constitutional law than does, for instance, the celebrated judicial evolution of the law of products liability in the law of torts. It even suggests that the reference back from the cases to "the language and historic meaning of the Constitution itself," which Jackson hailed, might from time to time serve future needs to reexamine

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3. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23 (1936).

4. Jackson, *Back to the Constitution*, 25 A.B.A.J. 745 (1939).

5. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

the dogma of the law, in Holmes's phrase, as it served the generation of 1939.<sup>6</sup>

What I want to discuss is a problem in the theory of one such dogma of constitutional law: the judicial formula that a law is invalid by virtue of the fifth or the fourteenth amendment unless it is a rational means toward some intended legislative end. The formula is well known to everyone who has studied constitutional law. The question of theory that it poses is this: What is due process of law in legislation, or, more briefly, what is due process of lawmaking?

The question is not new. What makes it timely in 1975 is the return, after forty years, of active judicial appraisal of the substance of laws directly under section one of the fourteenth amendment and also, by a curious form of reverse incorporation, under the due process clause of the fifth, an appraisal for "reasonableness" which is unaided by substantive values attributed to other provisions of the Constitution. The practice itself would seem thoroughly familiar to the lawyers and commentators of the 1920s, even if the clients who are most benefited by its revival fifty years later would not. Just as familiar would be the current formulations of standards for judicial review of legislative policies, after a brief refresher course to pick up the equal protection talk. If the development would startle Solicitor General Jackson, he can put part of the blame on an opinion of Mr. Justice Jackson in *Railway Express Agency v. New York*.<sup>7</sup>

Before turning to these judicial formulations, however, let me offer another word about theory. Although we begin with the formulas of Supreme Court cases, our concern is not with the current state of the Court's case law. Rather, I propose to look at the assumptions about constitutional lawmaking that are implicit in the judicial formulas in order to examine whether they represent a tenable constitutional theory.

Constitutional theory, in this context, can refer to some very different questions, depending on whether one chooses to focus on the institution of judicial review or on the interpretation of the

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6. Justice Frankfurter, then in his first year on the Court, wrote about the tendency to "encrust" interpretations upon the Constitution and "thereafter to consider merely what has been judicially said." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491 (1939) (concurring opinion).

Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.

*Id.* This insight, of course, will come easier to new judges when the "we" who said it is purely institutional rather than personal.

7. 336 U.S. 106 (1949) (concurring opinion).

Constitution that judges offer in explanation of judicial review. In the classical view, the foundation on which Chief Justice Marshall built judicial review in *Marbury v. Madison*,<sup>8</sup> courts can invalidate an act of the government only when it fails to heed a constraint expressed or implied in the Constitution. Theory, then, means the theory intrinsic to the judicial doctrines themselves, a theory of the Constitution as a charter by which government is to govern. Theory means, first, the premises that are offered in explanation of the doctrines, and second, the implications which these doctrines in turn have for the future conduct of courts and other institutions of government.

Another view is more fashionable and no doubt more realistic. It finds the central fact of American constitutional law not in the Constitution as a political charter but rather in the institution of judicial review. Of course Marshall purported to derive judicial review from a duty to obey the constitutional text, but once the institution of review was established, the law of the Constitution inevitably became a consequence of the fact of review rather than vice versa. Since it has become the solemn task of American courts to assure that the country's laws and institutions remain responsive to its needs and its presumed ideals, the art of judging is to accommodate these competing needs and ideals, to relate the conclusion to the phrases of the Constitution when possible, and not least importantly, to preserve the institution of judicial review itself. In this approach, theory concerns the proper relationship between court and government, the wise use of judicial power to strike the right balance between continuity and change, and a preoccupation with the logic of decision is more hindrance than help. A theory of decision may, indeed, be dispensed with altogether, as we saw in the abortion cases, and, it has recently been argued, so too may be the search for any peg in the text or structure of the Constitution as a premise for judicial action.<sup>9</sup>

The formula that laws are invalid unless they are rational means toward permissible legislative ends, however, has long been recited as a genuine standard of constitutional law. Without this formula some recent decision would have posed much more difficult and searching questions for the Supreme Court, and its revival by the Court poses very practical questions for advocates and lower courts throughout the country. Let us, therefore, pay it the respect of taking it seriously. I propose to examine the formula, first, as a premise for judicial review, and second, as a premise for the con-

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8. 5 U.S. (1 Cranch) 137 (1803).

9. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975).

stitutional conduct of government. Finally, we will ask whether due process can mean something else in lawmaking than a bar against oppressive or unreasonable laws.

This will be an excursion into speculations about constitutional theory. If the excursion takes us rather far from what we know to be the actual judicial practice, you may judge at the end whether it was a quixotic undertaking, and I will rest on my quotations from Justice Holmes and Justice-to-be Jackson.

## II. "RATIONALITY" IN JUDICIAL REVIEW

*Detour: The Equal Protection Clause.* Let us recall briefly how we came to revert, in the 1970s, to this judge-made formula that laws be rational means to a legislative end. The notion had been, of course, axiomatic to judicial review of the so-called "police power" in what we used to refer to as a past "era of substantive due process." On occasion the formula was recited as a test for equal protection, but this use was quite limited, because a law-maker's policy would be sustained "if any state of facts reasonably could be conceived that would sustain it."<sup>10</sup> We need not here retrace case by case how judicial review of the "rationality" of laws has reemerged from the equal protection clause. Briefly, the modern revival of equal protection doctrine initially consisted of finding new applications for the central principle of the clause: the protection of "discrete and insular minorities," identifiable by "immutable characteristics," against "discrimination" founded in "prejudice."<sup>11</sup> A law directed against members of such a minority *ad hominem*, classifying them by who they are rather than what they do, created an "invidious" or "suspect" classification and would be subjected to "strict scrutiny" to see if the classification was necessary to achieve a "compelling state interest."

There is room for debate in the expansion of the list of suspect classifications from race, color, ethnic or national origin, through illegitimacy and alienage, to the current disagreement over classification by sex, just as there is room for debate about compelling state interests. But the important thing about this line of expansion was that it kept the focus on the characteristics of the disfavored class, that is to say, on the classification *ad hominem*. For what is it that "suspect classifications" are suspected of? The suspicion, in that phrase, is suspicion of *prejudice*—not simply prejudgment based on ignorance and mistaken notions of fact, but *invidious* prejudgment, grounded in notions of superiority and

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10. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

11. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

inferiority, in beliefs about relative worth, attitudes that deny the premise of human equality and that will not be readily sacrificed to mere facts. The suspicion of prejudice focuses on the lawmaker's sense of values, not on his rationality.

It was an innovation to extend strict scrutiny also when persons suffer discriminatory consequences for exercising guaranteed privileges, such as freedom of travel or speech or religion, but this too has solid constitutional ground outside any demand for reasonableness. Equal protection classification applies here only because what the state has denied, such as welfare, or unemployment compensation, or public employment, or access to higher education, is not itself a constitutional entitlement; if it were, the equal protection claim of discrimination would be superfluous. A state need not maintain a welfare program, for instance, but if it does, it cannot deny welfare to short-time residents. Discrimination against recent arrivals is the invidious classification, not a forbidden deprivation of the right to travel, a premise that the Supreme Court promptly lost sight of after *Shapiro v. Thompson*.<sup>12</sup>

Finally, strict scrutiny was demanded when so-called fundamental interests were impaired by a trait that could not be called an invidious classification across the board, specifically, wealth or poverty. This extension seems to have stopped at certain rights of access to the political and legal process, when the Court declined to find education a fundamental right for lack of a constitutional source.<sup>13</sup> An intrinsic weakness of fundamental rights terminology is that it proves too much for mere equal protection: if a right is constitutionally fundamental, why may it be denied to everyone alike?

This, in brief, summarizes the famous two-tier model of equal protection analysis. It deserves a better press than it has had in its later years. The two-tier model, as applied to policy making, offered a simple dichotomy: Government may not discriminate against persons on certain *ad hominem* grounds unless it can overcome a strong suspicion of a prejudice that runs counter to the

12. 394 U.S. 618 (1969). See also *Dunn v. Blumstein*, 405 U.S. 330 (1972). The confusion may have arisen in part because Connecticut actually argued that exclusion of indigents was a permissible purpose of durational residence requirements for welfare, and the Court held this a forbidden objective. But does *Shapiro v. Thompson* mean that a state must provide a welfare system if its absence would deter indigent immigration, indeed if this is a reason why none has been enacted? If *Shapiro* meant that, it would not be an equal protection case striking down invidious discrimination in welfare aid. 394 U.S. at 627, 633, 638.

13. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

equality postulated in the fourteenth amendment itself, nor may it discriminate on grounds made impermissible by other provisions of the Constitution; and it must be careful not to cause avoidable social and economic distinctions in access to the political and legal processes themselves. In all other respects, the reach and limits of otherwise valid laws are assumed to have adequate explanations in whatever combination of policies caused them to take the shape they did. The strength of this simple model is not just that its premises are manageable in practice, though that is no small advantage. Its strength is that it calls for judicial scrutiny of a law only by reference to values located somewhere in the Constitution, values external to the complex of ends and means and mere inertia that has resulted in the existing state of the law. Two-tier equal protection does not invite litigants and courts to test these products of action and inaction against the bare claim that the resulting balance among competing demands is intrinsically unreasonable.

Yet the two-tier model has its price. Since it requires the reviewing court to accept or reject the demand to exercise strict scrutiny, it does not let the court use equal protection precisely to avoid committing itself on the underlying constitutional claim.<sup>14</sup> It denies the court one tool of ad hoc case-by-case disposition that is always a preferred judicial option. And so by 1972 Professor Gerald Gunther noted a substantial departure from two-tier analysis and efforts by several Justices at new formulations under the equal protection clause. The efforts had not yet been very successful, in Gunther's view, but he welcomed the new interventionist direction of these efforts and thought that they might be made "justifiable, attractive and feasible."<sup>15</sup> The means, he suggested, was to give new bite to the demand for minimum rationality in lawmaking which in the two-tier approach was simply a phrase for judicial deference to legislators, the same deference accorded them under the due process clauses. Stated most simply, the "means-focused" model of review "would have the Court take seriously a constitutional requirement that has never been formally

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14. For example, a decision like *Chicago Police Dept. v. Mosley*, 408 U.S. 92 (1972), using equal protection rather than the first amendment to strike down a law which prohibited picketing near schools but which excluded labor disputes, nevertheless needs the first amendment premise to challenge the classification. A different treatment of labor disputes and other disputes in most contexts easily withstands an equal protection challenge.

15. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19 (1972).



abandoned: that legislative means must substantially further legislative ends," a principle which Gunther believes "survived the constitutional revolution of 1937."<sup>16</sup> Since the yardstick for the rationality of the means would be the purposes chosen by the lawmakers, scrutiny of means would let the reviewing court avoid value judgments about legislative purposes or their relative weights.<sup>17</sup>

The attractiveness of this approach to many reviewing courts has become increasingly evident since 1972. Our present interest is in its major premise. That premise is a thoroughly instrumentalist view of law. It not only assumes that a law is always a means to an end, but it also asserts that law is constitutionally required to be a means to an end, and a rational means at that. If the premise is correct, it is hardly limited to the obligation of rational classification under the equal protection clause. Gunther himself sees classification as only a more specific formulation of a general principle inherent also in due process.<sup>18</sup> Obviously, instrumental rationality was an axiom of the old substantive due process cases. Paul Brest also asserts that it survives as a modern standard of due process.<sup>19</sup> Actually, it is not easy to find a modern Supreme Court holding that supports these assertions, because the Court for forty years has turned back every due process attack based on a mere lack of rationality. A few Justices have cared about the premise. Thus Justice Black, newly appointed in 1938, declined to join in that part of Justice Stone's famous *Carolene Products* opinion which left open a possible due process attack on the factual basis of a law, and when the Court twenty-five years later adopted

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16. Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing. *Id.* at 20-21. For later evidence of this "evolving doctrine," see, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), another case under the fifth amendment.

17. *Id.* at 21-22.

18. *Id.* at 20.

The distinction is not so much between equal protection and due process as between judicial scrutiny with regard to means and that directed at ends. . . . But due process, like equal protection, also purports to impose a requirement of a minimally rational means-end relationship.

*Id.* at 23.

19. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. Ct. Rev. 95, 106.

Black's position with a conspicuous omission of rational relation talk, Justice Harlan in turn declined to join in that opinion.<sup>20</sup> Mostly the Court found it easier to recite hypothetical reasons for a law than to argue about the irrelevance of reasons.<sup>21</sup> But a lower court misled by such opinions into discovering an insufficiently reasonable law would find itself reversed.

Despite these doubts, it seems unlikely that a revived scrutiny of laws for rationality would long be limited to protection against unequal treatment. It is too fine a line to draw. With respect to federal law, equal protection is itself a recent and rather awkward application of the due process clause. The Supreme Court's latest holding that lawmakers deny due process when they act on "conclusive presumptions" shows that several Justices are searching for another handle on substantive review than equal protection.<sup>22</sup> State courts, at least, would hardly doubt that review of the rationality of laws meant a return to a view of due process that many of them have never ceased taking for granted. Although we might have backed into it from the equal protection clause, the doctrine, or as Holmes would say, the dogma, that law must be a rational means toward a legitimate end would soon be taken again to be a requirement of due process.

But why not, one may ask? Would anyone argue that laws should not be rational means toward legitimate ends? Of course not. Put more precisely, would anyone defend the *validity* of a law that does not reasonably serve some purpose? That question is much harder.

In practice, of course, lawyers defending a challenged law will offer a court some pragmatic explanation. Here is a clear triumph of experience over logic. The mere existence of judicial review pushes cases into this form of ad hoc justification whether or not a constitutional premise requires it. Usually it is easier for both counsel and court to deal with a rational-basis attack in its own terms than to debate whether a law can be attacked on that ground

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20. 304 U.S. 144 (1938); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

21. See *North Dakota State Bd. of Pharmacy v. Snyder's Stores, Inc.*, 414 U.S. 156 (1973); *Brotherhood of Locomotive Firemen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129 (1968); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955). Justice Douglas, for instance, who had rejected due process review on principle in *Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236 (1941), speculated on possible reasons for the laws sustained in *Williamson v. Lee Optical Co.*, and returned in *Snyder's Stores* to the position that "opposed views of public policy are considerations for the legislative choice." 414 U.S. at 167.

22. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

at all. Holmes once said that there ought to be a better reason for a rule of law than that it was so laid down in the reign of Henry IV,<sup>23</sup> but many lawyers and judges feel that there must be a better reason for a law than that it was enacted by more than one-half of those voting on the issue in a legislative body. The hesitancy any lawmaker, public official, or counsel would feel in denying a duty to defend the purpose of the usefulness of a law sustains the practice more than any analysis.

The sense of obligation to justify an exercise of power is essential in a democracy. But it does not prove that a law is unconstitutional unless such a justification is made to a court or unless it could be made. The recent experiments of the Supreme Court with rational-basis formulas are moving the question of whether the formulas themselves have a rational basis back to center stage, where it was a half-century ago. And a new generation of critics is demonstrating that an affirmative answer is difficult indeed.<sup>24</sup> Let us turn to some of these difficulties in the dogmas of rational lawmaking.

*The Functions of Constitutional Norms.* I must begin by stating more fully the point of theory that is central to what I have to say. It is that government must be shown to have failed in some respect to comply with the Constitution before a court can invalidate a law. Except for sections dealing with courts and judicial procedures, constitutional directives for what to do and what not to do in making and administering law are addressed to government in the first instance, and to judges only upon a claim that government has disregarded such a directive. On this Marshall founded the extraordinary judicial power to hold what lawmakers have enacted as a law to be not a law. Judicial review is the conse-

23. Holmes, *supra* note 1, at 469.

24. I refer particularly to Professors John Hart Ely and Laurence H. Tribe of the Harvard Law School, and Paul Brest of Stanford.

Many of the issues reviewed here are discussed also in Brest, *supra* note 19; BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING (1975); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Linde, *Without "Due Process"*, 49 ORE. L. REV. 125 (1970); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1972); Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 269 (1975); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973); Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974); see also an excellent Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). The authors will recognize my debt to them, as I do, even if I do not repeat these citations as the argument develops below.

quence of the constitutional rule, not the other way around. I am not speaking of literalism in interpreting the Constitution; the rule may be explicit or it may be implied from the constitutional text or from history or structure. Whatever the source of the rule, in theory a conscientious government must have been able to comply with it if a court is to hold that it should have complied, or at least the government must be able to know how to comply in the future. The rule must make sense not only as a criterion for judicial review but as a theory for the constitutional conduct of government antecedent to judicial review. This is not a demand of prudence but of the logic of judicial review itself. Experience tell us the Constitution is what the judges say it is. But in logic, the judges themselves are bound to assert that the Constitution, however they interpret it, is a norm by which government could and should govern.

The point sounds so obvious that I am embarrassed to belabor it.<sup>25</sup> I do so only to draw attention to two different questions we need to put to any Supreme Court formula, such as the formula that a law must be a rational means to a legislative end. One question is whether the formula states a workable criterion to be applied by reviewing courts. Since our constitutional law scholarship is preoccupied with judicial review, most of the critiques of the Supreme Court's formulas address that question. The other question is the one I have just stated: Do the formulas make sense as a theory for the constitutional conduct of government? As we shall see, some of the difficulties with "rational-basis" review are intrinsic to the process of judicial review itself. Others lie in the assumptions that it would impose on the lawmaking process.

"Means-Ends" Review. Let us examine the doctrine that a valid law must be a rational means to a legitimate end as a for-

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25. There is, in fact, high authority for the opposite view. Justice Stone, in the course of lecturing on the common law analogy to constitutional adjudication, once said that "the great constitutional guarantees and immunities of personal liberty and of property . . . are but statements of standards to be applied by courts according to the circumstances and conditions which call for their application. . . . They do not prescribe formulas to which governmental action must conform." Stone, *supra* note 3, at 23. I doubt that Stone meant literally that the first, fourth, fifth or fourteenth amendments were directed to judges rather than to government officials either as a matter of historical intent or of analysis, or that as a former Attorney General he would have advised executive officers to do what they thought necessary (for instance, to burglarize in the interests of national security) until a court applied one of those great constitutional guarantees to stop them. The quotation shows how by 1936 half a century of preoccupation with judicial review had reversed what was premise and what was consequence in constitutional law.

mula for judicial review. Remember that it cannot be a formula only for the Supreme Court of the United States. What does the formula imply for the process of litigation in the hundreds of state and federal courts in which counsel seek to raise constitutional objections against state and local laws irksome to their clients? Forty years ago, Felix Cohen wrote of it: "Taken seriously this conception makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren."<sup>26</sup>

The first problem in examining the formula is the identification of goals. Professor Gunther stressed that the reviewing court should concentrate on the rationality of the means without disturbing the legislative choice of ends.<sup>27</sup> Still, although it purports to leave policy choices to the political process, the test depends on holding the law to some objective other than the immediate effect of the law itself. Thus it forces litigants to debate the ostensible or assumed goal of a policy as much as the likelihood that the goal will be reached by means of the challenged law. And the effort to phrase this debate as a scrutiny of reasons rather than of values—of rationality rather than of legitimacy—leads court and counsel into a labyrinth of fictions.

One of the criticisms levied against the formula is that a law, even at the time it is enacted, is rarely meant to achieve one goal at the sacrifice of all others. This is most obvious in the case of statutory exemptions. Suppose a regulation, in my state of Oregon, imposed a weight-per-axle limit on all trucks in the interest of highway maintenance and safety, but allowed a higher limit for log trucks. The exemption would obviously be adopted not because log trucks are less of a danger to the highways, but because the state chose to protect the highways only to the extent consistent with another policy, not to hamper an important industry. By the same token a pollution law might exempt steel mills, or a bonding requirement might exempt trucks carrying agricultural goods. Certainly such exemptions are very rational means toward their ends, as the industries benefited by them will have argued strenuously and successfully to the respective legislative committees. To invalidate one of them, as was done in the 1931 decision in *Smith v. Cahoon*,<sup>28</sup> means to deny the legitimacy of the government's policy choice, not its rationality.

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26. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 808, 819 (1935).

27. Gunther, *supra* note 15, at 23.

28. 283 U.S. 553 (1931).

The principle is the same when a litigant protests that a burden has been placed on him for the benefit of another as when he protests an exemption granted to another. Suppose a legislature is persuaded, over the protests of opticians, that only ophthalmologists and optometrists should be permitted to adjust eye glass frames, and an optician attacks this regulation under the fourteenth amendment. Or suppose another legislature is persuaded by dairymen to prohibit the sale of a milk substitute in which butterfat has been replaced by vegetable oil. How does judicial review tackle the issue of whether these laws are rational means toward permitted ends? If you have recognized *Williamson v. Lee Optical Co.*<sup>29</sup> and *United States v. Carolene Products Co.*<sup>30</sup> in these examples, you will know that the Supreme Court in each case sustained the regulation by finding that legislators could rationally believe that the measure would protect a consumer interest. But why must it be a consumer interest? The answer, of course, is that it need not be; this is only an easier way to sustain the law. What if all the evidence showed beyond dispute that opticians are excellent at fitting eye glasses and that vegetable oils are at least as healthy as butterfat, and government counsel had enough sense to defend the regulations as efforts to protect the economic security of optometrists or dairymen? Since the laws are likely to make some contribution toward that goal, they cannot be called irrational. Instead, the litigants and the reviewing court are driven to search for a constitutional issue in the legislature's aims rather than its method—the very issue that means-centered review is intended to avoid.

In these examples we still try to identify a pragmatic goal of legislation, protecting highways here, helping farmers there, trading off one interest for another largely with an eye on economic or social consequences. But why assume that laws are shaped only by pragmatic purposes? Men and women elected to lawmaking positions do not check their unspoken social assumptions, their human sympathies for various claims of equity or propriety, at the doors of the legislative chambers. You may recall the case in which the Railway Express Agency ("REA") attacked a New York City regulation that banned the use of trucks to display general commercial advertising but exempted signs publicizing the business of the owner of the vehicle. The company argued that the distinction was not justified by the purpose of the regulation, that one of REA's trucks carrying an advertisement for Macy's would cause no greater distraction for other drivers or pedestrians than one of

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29. 348 U.S. 483 (1955).

30. 304 U.S. 144 (1938).

Macy's own trucks.<sup>31</sup> Justice Jackson took the occasion in the separate opinion noted earlier to state the view of equal protection—scrutiny of differential treatment for its relevance to the legislative purpose—that is the foundation of Gunther's "Model for a Newer Equal Protection."<sup>32</sup> In the majority opinion, Justice Douglas disposed of REA's claim in a sentence: "The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use."<sup>33</sup> That is not judicial review but dismissal of a claim of review. But why should a court ask whether the lawmakers concluded any such thing? After all, if Railway Express switched from dull, conservative posters for Camel cigarettes to lurid, psychedelic signs heralding its own services, New York nevertheless would let its 1,900 mobile billboards roam the streets at will. Suppose instead that the lawmakers never doubted that all travelling signs were equally undesirable but felt that a business had a more equitable claim to identify itself on its trucks than to take up the advertising business as a sideline. Such a sense of the equities may be shared or opposed, but its constitutional validity does not depend on arguments about traffic safety.

Along the same lines, veterans' preference in public employment is better explained as direct appreciation or sympathy than as a calculated means toward some pragmatic goal, such as future recruitment, and the same can be said about tax or other advantages unrelated to financial need for widows or disabled persons.<sup>34</sup>

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31. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

32. Gunther, *supra* note 15.

33. 336 U.S. at 110.

34. See *Kahn v. Shevin*, 416 U.S. 351 (1974); *Fredrick v. United States*, 507 F.2d 1264 (Ct. Cl. 1974). In this view, the grant of property tax exemption for widows but not for widowers would be sustained, not because it was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss," 416 U.S. at 355, but because it was not an "invidious" expression of prejudice in the sense stated above. See p. 201-02 in the text. By the same test, a city ordinance disqualifying from employment veterans with less-than-honorable discharges, but not civilians with records of improper or criminal conduct, might well prove to be an expression of simple prejudice about short-comings in performing a patriotic duty. See *Thompson v. Gallagher*, 389 F.2d 443 (5th Cir. 1973) (another example in which a court expressly employed "rationality" as a test of due process as well as equal protection). The fourteenth amendment, textually and in the context of 1868, speaks to the hostile *denial* of equal protection to disfavored persons or groups, rather than to expressions of special sympathy. Contrast the earlier clauses typical in the states with post-revolutionary constitutions, prohibiting laws *grant-*

The point appears also in contemporary attacks on the automobile guest statutes for denying equal protection of the laws. In the decision that set off the current round of cases, the California Supreme Court rejected three possible reasons for denying guests in automobiles tort recoveries that are available to other guests and to business passengers: to encourage hospitality, to prevent collusive law suits, or to avoid rewarding ingratitude.<sup>35</sup> Note that these hypothetical reasons are not of the same order. Only the first two assume pragmatic objectives; the third, the notion of ingratitude, would express a sense of the fitness of things, not an instrumental aim. The Oregon Supreme Court declined to follow the California court. It held that the guest statute interpreted the moral sense of the community with respect to hospitality and ingratitude, and that it was the legislature's role to discern such community values.<sup>36</sup> The Iowa Supreme Court sustained that state's guest statute by reciting the policy justifications accepted by other courts, without making an independent examination of their validity in Iowa. But the heart of the matter was stated by Justice LeGrand in his concurring opinion:

Like many other courts, we have said our guest statute was enacted to avoid collusive claims and to prevent an ungrateful guest from suing his host. It should be noted that those are reasons the court has ascribed to the legislature. The legislature itself simply stated it enacted the guest statute to limit the liability of owners and drivers of motor vehicles . . . . It did not elaborate on why it did so.

Perhaps the reasons for limiting this liability are those we have attributed to them. But this is not necessarily the case. In any event it is important to remember these widely heralded motives were judicially conceived. They have never been legislatively expressed.<sup>37</sup>

Finally, in the same volume of reported cases, the Supreme Court of North Dakota very commendably tested the guest statute under the North Dakota as well as the Federal Constitution. The striking thing is that the court found the statute to be "unreasonable for any proper purpose of legislation . . . not based upon justifiable distinctions . . . arbitrary and overinclusive," and then held that

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*ing* "special privileges or immunities," as in Virginia's declaration that "no man or set of men is entitled to exclusive or separate emoluments or privileges from the community, *but in consideration of public services.*" VA. CONST. art. 1, § 4 (emphasis added); cf. N.C. CONST. art. 1, § 3.

35. *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

36. *Duerst v. Limbocker*, — Ore. —, 525 P.2d 99, 102-03 (1974).

37. *Keasling v. Thompson*, — Ia. —, 217 N.W.2d 687, 693 (1974) (special concurring opinion).



it passed muster under the fourteenth amendment but fell afoul of the state constitution.<sup>38</sup>

I pose this question: Suppose fourteenth amendment attacks on identical guest statutes had reached the United States Supreme Court from these four states. Taking the "means-ends" formula seriously, should the Court sustain them all, invalidate them all, or sustain some and invalidate the others?

The outcome of an attack on the rationality of a law clearly can be made to depend on whether the law is described as a means toward a somewhat remote end or as very close to an end in itself. The criticisms I have sketched so far suggest that the search for a goal beyond the enacted policy itself will be illusory because a policy often results from the accommodation of competing and mutually inconsistent values, or because it simply intends to favor one interest at the expense of another, or because it represents only a judgment of the justice or equities in the immediate issue without intending to accomplish any further aim. Very well; but should it not be possible to measure the rationality of a policy against its actual goals, whatever they are?

Certainly a court can sometimes search legislative history for the evolution of a policy, the stated aims of its proponents, the arguments presented to their colleagues, and the competing policies that had to be accommodated to enact any law on the subject at all. But in the end, the constitutional question will be whether the aim of the law is out of bounds, not whether it will miss its target—a question of legitimacy, not of rationality. It is a realistic postulate that laws do not get enacted for no reason at all, not in the American legislative process, but they may be and often are enacted for improper reasons. Thus in 1964, Congress had defined a household eligible for food stamps as a group of related or unrelated individuals living as an economic unit, purchasing and cooking their food together. In 1971, Congress amended the definition of households to disqualify unrelated persons under the age of 60. The Supreme Court first found that the distinction between households of related persons and those including an unrelated person was irrelevant to the original purposes Congress had declared in the 1964 Food Stamp Act, which were to promote health and well-being by better nutrition among low-income households and to strengthen the agricultural economy.<sup>39</sup> Accordingly, the 1971 amendment

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38. *Johnson v. Hassett*, 217 N.W.2d 771, 780 (N.D. 1974). Commendable as it was in method (whether or not in result), the court's independent reliance on the state constitution should have kept it from reaching any question under the fourteenth amendment. See Linde, *supra* note 24.

39. *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973).

was tested by its own goals, not those of the act as a whole. Perhaps food stamps might reasonably have been limited to households of related persons because Congress wished to subsidize only conventional families or to limit the opportunities for abuse of the food stamp program. That would not be irrational, as Justice Rehnquist said in dissent. But the legislative record showed that the 1971 amendment was aimed at disqualifying so-called "hippy communes," and the Court was prepared to declare this an impermissible aim to harm a politically unpopular group.<sup>40</sup>

Earlier, when Congress withdrew Social Security benefits from persons deported as former Communists, though not from all deportees, the Court had speculated that this might be a partial contribution to the balance of payments and did not see either an irrational classification for that hypothetical purpose or an aim to harm political outcasts.<sup>41</sup> Thus, the degree to which legislative purpose is scrutinized is easily manipulated even where legislative history exists. It is wide open when none exists. And, of course, legislative history of the kind we use for federal statutes, including not only published committee reports but recorded testimony and floor debate, is rarely available in state and local lawmaking.

*The Role of Counsel.* You will recognize that judicial review of laws as rational means to some end gives great importance to the role of counsel. Once a law is challenged on this ground, the reviewing court will expect the party defending the law to offer one or more purposes that the law might reasonably be thought to serve. Is it not curious that the fate of an act of the legislature should hang on the capacity and willingness of the government's lawyer, and sometimes of a private party, to phrase the law's objectives so that neither they nor the chosen means are vulnerable to constitutional attack?<sup>42</sup> What is counsel's obligation under the formula? Is it to defend the values that effectively moved the lawmaker to act when he did, however shortsighted or parochial they may be? Or is it to show that the law might serve some present social purpose, either drawn from the rhetoric of legislative declarations or postulated for the first time to the court?

The almost invariable impulse is to credit the lawmaker with aiming at some higher social goal, no matter how erratic this makes his course toward it appear. Indeed, a candid refusal to do so may backfire in state courts that assume the role of guardians of proper legislative purposes, with or without help from a constitution. In one unfortunate case a few years ago, counsel for some small truck-

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40. *Id.* at 534-35.

41. *Flemming v. Nestor*, 363 U.S. 603 (1960).

42. Cf. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 6 n.28 (1973).

rental firms explained to the Oregon Supreme Court that his clients had succeeded in placing their business under public utility regulation in order to protect themselves against competition from large national chains. The court treated this statement as a confession; it struck down the law on the ground that "[t]he desire of some members of a given industry, business or profession to achieve a 'little monopoly' could not be made more palatable by asserting it is in the 'public interest,' even though the legislature might be induced to say so."<sup>43</sup> The decision was quite wrong, in my view, but what it rejected was clearly the low and simple aims of the law rather than its rationality as a means to its end.

Sometimes it will be harder for a court to set aside a non-instrumentalist value underlying a law than to find that the law does not further the practical goal invented for it. But it takes an advocate of unusual confidence to perceive this possibility and to rely on it in defending the law. Consider the recent decisions invalidating compulsory maternity leave for school teachers. The Supreme Court noted with evident relief that the school boards disclaimed reliance on an "outmoded taboo" against having school children taught by conspicuously pregnant teachers, which appeared to have been the original motive for the rule.<sup>44</sup> Since counsel instead offered such "after-the-fact rationalizations," in Justice Powell's phrase,<sup>45</sup> as protecting the health of the teacher's unborn child and the administrative convenience of scheduling, the Court could happily proceed to find mandatory leave a needless imprecise means to those ends.<sup>46</sup> Counsel's defense of the rule might well have been more challenging, and it could not have been less successful, if it made the Court face the question of why an aim to delay the younger children's curiosity about pregnancy, or simply to accommodate the outmoded squeamishness of some regrettably old-fashioned parents, is not merely foolish but forbidden by the Constitution.

Of course, the court can refuse counsel's explanation of the legislative purpose as readily as it can substitute his defense for the original policy. Shortly after the maternity leave cases, the Supreme Court had before it the conviction of a Seattle college student for displaying a peace symbol super-imposed on a United

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43. *Hertz Corp. v. Heltzel*, 217 Ore. 205, 218, 341 P.2d 1063, 1069 (1959). See also *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Penn. 25, 58 A.2d 464 (1948).

44. 414 U.S. at 641 n.9.

45. *Id.* at 653 (concurring opinion).

46. *Id.* at 640-48.

States flag flown upside down, in violation of a state law. The per curiam opinion complained of being met "with something of an enigma in the manner in which the case was presented."<sup>47</sup> The state supreme court had found no threatened breach of the peace but had affirmed the conviction on the basis of a national and state interest in preserving the flag as a symbol of the nation. The state's counsel, on the other hand, conceded that the state had no legitimate interest in promoting respect for a symbol; in his view the only tenable basis for Washington's law was the breach-of-the-peace theory which the state court had rejected. In the end, the Supreme Court reviewed the defense offered by Washington's judges rather than by the state's advocate; it then concluded that the law had been unconstitutionally applied in the appellant's case.<sup>48</sup>

In sum, identification of the goals of a law offers wide choice between the past assumptions of a policy and its present justifications, between actual and merely hypothetical goals, between immediate objectives and larger social aims, between a series of separate goals or a single accommodation of competing interests, and between the statements of legislators, executive officers, or state courts. A formula for testing the constitutionality of a law as a rational means to an end needs to specify how to identify the relevant legislative purpose among these different choices. But there is a reason why the judicial formulations have not done this.

*Lawmaking and Change.* The reason, I think, lies in the basic ambivalence of this kind of review toward its underlying theory: whether it purports only to keep lawmakers within constitutional bounds of responsibility, or whether it means to maintain continuing judicial surveillance over the substance of laws. For a main difficulty with reviewing laws for rationality is the problem of time; that is, the time at which the law must be a rational means to an end in order to be constitutional. A somewhat similar difficulty is the problem of place, that is to say, whether a law can be found rational or irrational beyond the conditions in the area where it is enacted and where it is being tested. The dilemma is plain enough. Rationality, as a test, purports to address itself to that part of the lawmaking hypothesis that deals with prediction, with causes and effects in the world of physical and social reality. And this always means the reality of some time and place. But laws are made at one time and challenged at another. The problem of time is whether a law is to be judged for its rationality when it was enacted or at the time when it is challenged.

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47. *Spence v. Washington*, 418 U.S. 405, 411 (1974).

48. *Id.* at 414.

I quoted earlier the Supreme Court's formulation in 1911 that a law would not be found unconstitutional "if any state of facts reasonably can be conceived that would sustain it."<sup>49</sup> The remainder of that sentence reads: ". . . the existence of that state of facts *at the time the law was enacted* must be assumed."<sup>50</sup> This initial formulation focused on responsible lawmaking: an act of the legislature is rational or not in relation to the situation facing the legislature at the time of enactment. Suppose the law were challenged at once as an irrational means to its supposed end; then the goal of the legislative policy would be determined as of the time of enactment. If the law passed muster, its constitutionality would be taken to be established. But if rationality of law-making is the test, no different result should follow merely because the challenge happens to come at a later time. One can speak of legislative objectives and a rational choice of means only with respect to a legislative decision that succeeds in producing a law. Before and after enactment, there are always unachieved ends that lack agreement on suitable means, as well as disputes over the value of existing laws that must await agreement on amendments or repeal; moreover, the identities of the lawmakers vary constantly. Their changing reasons for not making a law are hardly the stuff for judicial review.<sup>51</sup>

If responsible lawmaking is the premise of review, the purpose against which the rationality of the means is tested must obviously be the purpose intended at the time of enactment. It would make

49. 220 U.S. at 78.

50. *Id.* (emphasis added).

51. The validity of a law is not usually considered to be impaired by the fact that it represents only a momentary diagnosis and prescription by a short-lived legislative majority that may at once have been repudiated on the very issue. As Merton Bernstein has pointed out:

We take for granted that statutes once enacted continue in force until a later legislature takes affirmative action by a fresh majority to repeal or amend. Few statutes other than appropriation measures are enacted for limited periods; practically none expires with the legislature that enacted it despite the sometimes tenuous majority that enacted it. Although that majority no longer commands voter support, its law continues in force until a new coalition can be mustered to enact a new statute—a formidable task because not only must the old statute be repealed but a successor must be fashioned in a very complex process of accommodation. . . . The only Republican Congress in a period of twenty years enacted the Taft-Hartley Act in 1947. A Democratic resurgence featured by the success of candidates prominently pledged to that statute's repeal failed to achieve the announced goal.

Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 574 n.10 (1970).

little sense to accuse past legislators of irrationality because the facts on which they acted have subsequently changed. If a legislature acted rationally when it decided to limit the adjustment of eye glasses to optometrists or to forbid trucks from carrying commercial advertising, its decision is not retroactively made irrational by thereafter adding new training courses in opticians' schools or by showing that traffic on New York streets has come to a permanent standstill and cannot possibly be distracted by mobile signs. It would make just as little sense to sustain a law because it turns out to serve some useful purpose different from the one for which it was originally enacted. When a rule requires teachers to take maternity leave in order to keep pregnancy out of classrooms, the rule is a rational means to its original end. If on subsequent judicial review the end itself is regarded as an outmoded taboo, the rule cannot be defended as a rational response to a different problem that never occurred to the lawmaker. Legitimate ends and rational means must coincide at the time of the legislative decision, if responsible lawmaking is the constitutional premise.

But that is logic. Experience tells us that this premise is too stringent for the daily practice of judicial review. In practice, court and counsel want to debate whether the law is constitutional now, not when it was enacted. The institutional thrust of judicial review is to maintain continuing surveillance over the substance of laws, not over lawmakers. If one formula of this surveillance is that laws must serve some legitimate social purpose, parties will be expected to litigate what purpose the law serves on the state of facts as they exist today, not on the state of facts at the time the law was enacted, as the Supreme Court prescribed in 1911.<sup>52</sup> Thus, the Court has also said—in that part of Justice Stone's *Caroline Products* opinion in which Justice Black would not join—that the continued validity of a law may be challenged upon a change of factual circumstances when the law was predicated upon a particular state of facts.<sup>53</sup> Indeed, this emboldened a lower federal court in 1972 to hold that the same filled milk act twice sustained by the Supreme Court now deprives the successor of the *Carolene*

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52. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

53. 304 U.S. at 153, citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

In *Chastleton*, it was assumed that rent control in the District of Columbia would be invalid except for the existence of a wartime emergency; in fact the Government felt obliged to rest rent control on the "war power" rather than on Congressional power to govern the District. The Court held that the continued existence of such an emergency, once declared in the statute, could be challenged on the basis of a contrary allegation and evidence introduced in court.

Products Co. of property without due process of law.<sup>54</sup> I doubt whether this holding would have been affirmed by the Supreme Court either in 1944 or in 1972.<sup>55</sup> Still, if the district court's decision was wrong because it second-guessed the instrumental rationality of a 1923 statute by the nutritional standards of 1972, it would have been just as wrong if the filled milk act had never before been sustained. On the other hand, if the reasonableness of a law on present facts is subject to continuing review regardless of its original rationality, then no decision ever settles that a law is constitutional on this score. To the extent that the 1944 *Carolene Products* opinion<sup>56</sup> rested on the possibility that consumers might confuse filled milk with natural milk, the validity of the filled milk act could be relitigated the next day upon a showing that the producer had completely redesigned its labels to avoid all risk of confusion. But this approach to constitutional law is also unsatisfactory in practice. The Congress is not the Federal Trade Commission.

The everyday choice between the two theories of review and their implications is shown by a very routine case at the level where the constitutional dogmas of the Supreme Court are translated into practice. The city of Burns, a small town in eastern Oregon, had adopted an ordinance in 1949 limiting the underground storage tanks of gasoline stations to a maximum capacity of 3,000 gallons each or 4,000 gallons at any one location. In 1966, a dealer who wished to truck his own gasoline from Portland and by-pass the local bulk storage plants, installed a 10,000 gallon tank and sued to have the ordinance declared unconstitutional. The court conducted a lengthy trial at which expert witnesses testified about the relationship between the size of underground gasoline tanks and the risk of accidental fire, and about the topography, sewer system, traffic patterns, and firefighting capabilities of the city of Burns. On this evidence, the court held the ordinance void for lack of any reasonable basis in promoting safety, and the Oregon Supreme Court affirmed.<sup>57</sup> No one stopped to question the original validity of the ordinance under the conditions of 1949; only the conditions at the date of trial were considered. I do not know whether this case represents judicial review for rationality as the proponents

54. *Milnot Co. v. Richardson*, 350 F. Supp. 221 (S.D. Ill. 1972). Cf. *Carolene Products Co. v. United States*, 323 U.S. 18 (1944); *Sage Stores Co. v. Kansas ex rel. Mitchell*, 323 U.S. 32 (1944). In the two 1944 decisions finding that Congress and Kansas respectively had a "rational" basis to prohibit filled milk, Justice Douglas joined Black in concurring only in the result.

55. *Id.*

56. See note 54 *supra*.

57. *Leathers v. City of Burns*, 251 Ore. 206, 444 P.2d 1010 (1968).

of such review visualize it, although I am not sure why not if one assumes that due process calls for such review at all. However, my immediate point is that on its own terms the whole elaborate litigation has no value as a precedent on the constitutionality of laws limiting service tanks to 3,000 gallons or any other size. It could be a precedent at most for how to review such a law, if it were correct on that issue. The ordinance, which was unreasonable on the evidence concerning Burns, Oregon, might be constitutional in Baker, Oregon. It might even be constitutional in Burns by 1975, if there has been significant change in gasoline octane ratings or in traffic patterns or in some other fact bearing on the risk of leaks and accidents and explosions.

Of course, lawyers and judges are too wedded to precedent to confine my Oregon case in that fashion.<sup>58</sup> If a lawyer has a client who wishes to install a 10,000 gallon gasoline tank contrary to a city ordinance, he will be delighted and the city attorney will be chagrined to find that the Oregon Supreme Court has already held 10,000 gallon tanks safe and ordinances forbidding them unreasonable, although that was several years ago, and maybe his city council had some different objective in mind than the risk of fires. If the decision were made by the United States Supreme Court, one would be fairly certain that in practice, if not in theory, it knocked out such ordinances throughout the country. Yet review of rationality, since it refers to the lawmaker's prediction about the effects of his law, is tied to facts bearing on those effects in space and time, as distinguished from the values that he means to promote. A decision may find that a legislative goal is forbidden by the Constitution as far as the Constitution reaches. But a decision that lawmakers in a particular locale have pursued their goal by irrational means is precedent only as far as the goals and the facts remain the same.

This adds to the logical difficulty of the *time* of instrumental rationality the second paradox of *place*. Suppose the regulation challenged by the gasoline dealer in Burns had been a state law rather than a city ordinance. Would the constitutionality of such a state statute hinge on evidence about the topography and risks of fire in Burns? Would it depend on whether a case from Burns reached the court before one from downtown Portland? I should think not. If the state law were rational because of the risks of large gasoline storage tanks in Portland, could it be enforced in

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58. See *In re Martin* 88 Nev. 666, 504 P.2d 14 (1972), which decided against the validity of a limit on gasoline tank trucks by choosing between the "majority view" and the "minority view" of the other courts on the constitutionality of such ordinances.



Burns? Indeed, could the state adopt such a statewide law today, after the court's decision, and apply it in Burns? Why not, if the legislature had grounds for apprehension about large storage tanks in some locations in the state. In fact, if the same regulation were enacted by the Congress, it would presumably be enforceable throughout the country, as long as it might reasonably serve its supposed purpose under some circumstances. This is how we generally apply laws, without allowing a defense that they are not rationally needed in the particular instance.

But the effect is surprising. It is to make the client's attack on a law—his claim that the legislative policy deprives him of property without due process of law—depend neither on its goals nor on the facts, but rather on the level of government that made the policy: whether it was made by his own community, or in the more distant state capital, or in far-away Washington, D.C. For instance, the Supreme Court of Colorado could conclude in 1971 that there was no possible risk of deception or confusion that would justify prohibiting the sale of filled milk in Colorado, as the Nebraska Supreme Court and a number of others had concluded thirty-five years earlier in their respective states.<sup>59</sup> Each held its own statute unconstitutional for lack of a rational basis. Despite this, the federal filled milk act would continue to prohibit the sale of the identical products between Nebraska and Colorado. Is that because Congress could assess the relevant facts more rationally than the two local governments? This effect has curious implications for our cherished shibboleth that the government closest to home is also the most responsive to local conditions and the most accountable to its constituents.

*Summary.* So far we have been considering the difficulties with testing a law for rationality that are intrinsic to the process of judicial review itself. To summarize: the test depends on attributing a purpose to the lawmakers; but laws are often an accommodation of several unrelated purposes. Commonly, a law will push toward a goal only within the limits of objectives that may or may not be apparent in retrospect. Legislative declarations and legislative history cannot be relied on to reflect the actual balance of considerations that shaped the law, and often no such records are available. Although proponents might have wished for more and opponents for less, all that is certain about the law as a means to an end is that a majority could be found to undertake what the law in fact undertakes, no more, no less. That much is its immediate goal. If

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59. *People ex rel. Orcutt v. Instantwhip Denver, Inc.*, 176 Colo. 896, 490 P.2d 940 (1941) and cases cited therein, at 943; *Carlene Products Co. v. Banning*, 131 Neb. 429, 268 N.W. 313 (1936).

judicial review may hold a law invalid for failure to match some greater purpose, it places a premium on the manner in which counsel and court phrase the supposed legislative goals. Many of our laws simply reflect old notions of right and wrong, or sympathy toward the equity of some particular claim to legislative consideration, without intending to achieve any pragmatic aim. Such a law may be unconstitutional if it pursues a goal that the Constitution forbids, but not because the values it reflects are merely sentimental, or parochial, or old-fashioned, or foolish, rather than goal-oriented.

Even a law originally enacted to serve one pragmatic end, such as health or safety, will remain on the books as long as other vested interests that have grown up around the law retain legislative sympathy. Building codes once written to assure safe standards of materials and construction survive technological changes because they protect existing sources of materials and employment. The gasoline tank ordinance in the Oregon example would not easily be amended to allow 10,000 gallon tanks because of the competitive disadvantage this would inflict on all the service stations that complied with the old limitation. The same is true of the allocation of licensed work between opticians and optometrists, or barbers and beauticians, which is being much litigated at present.<sup>60</sup> Delay in changing old laws for such reasons may stand in the way of progress, but it cannot be called an irrational means toward the ends served by legislative inaction. So far as I know, neither does the due process clause deny our political process such policy choices

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60. See, e.g., *Maryland State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 312 A.2d 216 (1973), invalidating a law under which only barbers, but not cosmetologists (of either sex), were licensed to style male hair. The Maryland court held that the law failed the "rational relation" standard of equal protection because there was no difference between male and female hair. *Id.* at 508, 312 A.2d at 223. It also held that the same lack of "real and substantial relation to the object sought to be attained," purportedly standards of hygiene or competence, also violated due process. *Id.* at 512, 312 A.2d at 225.

When did the legislature commit this violation? The court wrote (on a point of interpretation) that "[t]o suggest that the legislature in 1935 was so possessed of clairvoyance that it could foresee such phenomena of the 1970s as the hirsute male and the 'unisex' hair salon, simply strains credulity." *Id.* at 505, 312 A.2d at 221. The court did not inquire whether the cosmetologists had sought due process from the lawmakers when these phenomena occurred. But suppose that such a request for amendment were rejected after due deliberation because of objections of barbers hard pressed by the change in fashions to retain their traditional share of the hair care market. Would this legislative inaction be an irrational means? Would it have an impermissible end?

as, for instance, to sacrifice economic efficiency in order to preserve the livelihood of bricklayers, or independent druggists, or dairy farmers. In any event, the ostensible issue of rational means turns once again into an issue of the legitimacy of ends.

Finally, judicial review of rationality is irretrievably ambivalent about time—whether to match past facts to past purposes, or present facts to past purposes, or present facts to present purposes—because it is ambivalent about its premise, whether it means to review the one-time reasonableness of lawmakers or the continuing reasonableness of laws.

### III. "RATIONALITY" AND THE LEGISLATIVE PROCESS

Let us turn from the problems of instrumental rationality as a premise for judicial review to its problems as a premise for law-making. I venture again the proposition that no court should invalidate an act of government for failure to comply with a constitutional rule unless the asserted rule is one with which the government should have complied, or should know how to comply with in the future. The institutional view mentioned earlier finds it not only possible but natural that there should be one formula for how government may legislate, and another under which judges review legislation; the different formulations merely reflect the division of labor between lawmakers and courts in our constitutional system. One might, indeed, imagine a constitution in which one clause simply instructs judges to set aside unreasonable, unjust, or outmoded laws, and as institutionalists we might say that this describes exactly the kind of constitutions we in fact have. But the actual clauses that we are discussing instruct government itself to act by due process of law, not simply to legislate subject to later judicial second-guessing. It is the alleged violation of a rule which government was bound to respect that gives rise to judicial review. This, at least, is the classical theory. And theory aside, lawmakers must in practice be able to comply with the demands of the doctrines of constitutional law if they are to make laws that can survive review under these doctrines. Legislators, government counsel, and lobbyists, as well as academic observers, owe the formulas the respect of taking them seriously. Keep in mind that to give new bite (in Professor Gunther's phrase) to the formula about rational lawmaking means that a judge is to assess the challenged law in relation to actual, not merely conjectural, purposes, and that he is similarly to gauge the reasonableness of doubtful means by realistic materials in the record and not by hypothetical rationalizations.<sup>61</sup>

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61. Gunther, *supra* note 15, at 20-22.

What, then, does the formula demand of lawmakers? The model of the legislative process that it demands was described some years ago by Professor Julius Cohen, who was then a distinguished teacher of legislation at the University of Nebraska Law School.<sup>62</sup> It looks something like this: A rational policy must be one that is designed to move events toward some goal. At a minimum, therefore, it requires three elements: some knowledge of present conditions; the identification of a preferred future, or a goal; and a belief that the proposed action will contribute to achieving the desired goal, a belief that is sometimes called the instrumental hypothesis. Of these elements, the decision on the goal is plainly a value judgment; knowledge of the present situation and the instrumental hypothesis each involve judgments about facts, about cause and effect.

The choice of action, however, involves elements beyond these three. If you know where you are and where you wish to go, there remains the choice between getting there quickly by car or more cheaply on foot. This is again a choice between different values, even when we assign some common denominator to the values of time, of your need for exercise and fear of being mugged, and of exposing yourself to polluted air when walking and your qualms about adding to pollution by driving. If rationality requires you to compute these elements, you are likely to stay where you are, and so is a legislature. Finally, there is the political element. If another member of the family wants to use the car, is an argument worth the strain on other goals that you seek in your relationship? When a policy is to be made, not by one decisionmaker, but collectively over a period of time, by an assembly of equals with different views of both ends and means, the ranking and accommodation of competing priorities become the most decisive element of all.

Rational lawmaking, if we take the formula seriously, would oblige this collective body to reach and to articulate some agreement on a desired goal. It would oblige legislators to inform themselves in some fashion about the existing conditions on which the proposed law would operate, and about the likelihood that the proposal would in fact further the intended purpose. In order to weigh the anticipated benefits for some against the burdens the law would

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62. Cohen, *Hearing on a Bill: Legislative Folklore?*, 37 MINN. L. REV. 34 (1952). Professor Cohen divided the elements into the present fact situation, the means-ends hypothesis, and the instrumental value judgment, and defined the last to mean that "the immediate end sought would be instrumental in achieving an even higher or more inclusive end or goal." *Id.* at 34.

impose on others, legislators must inform themselves also about those burdens. These demands on the legislative process imply others. The projections and assessments of conditions and consequences must presumably take some account of evidence, at least in committee sessions. A member who never attends the committee meetings should at least examine the record of evidence before casting a vote, or be told about it, and should certainly never vote by proxy. The committee must explain its factual and value premises to the full body. Surely there is no place for a vote on final passage by members who have never read even a summary of the bill, let alone a committee report or a resume of the factual documentation. In the forty-nine states which are less progressive than Nebraska, the second house of the legislature could hardly substitute a wholly different version of the bill without repeating the process of inquiry.<sup>63</sup> These kinds of demands are implicit in due process, if lawmakers are really bound to a rule that laws must be made as rational means toward some agreed purpose.

Of course, this sketch has been broadly drawn to emphasize its contrast with reality. As a model it is highly commendable, except that its enormous requirements of time would limit its use to a handful of new legislative proposals involving technical issues. In fact, at least the committee stage in Congress and in the better state legislatures probably resembles the model more often than does the situation described by Professor Cohen when he wrote in despair about the folklore of legislative hearings.<sup>64</sup> As the changing role of government replaces spare-time politicians with full-time professional legislators, this latter group eventually acquires both a greater stake in the permanence of their jobs and a different sense of the time and potential for becoming informed, a demand for the services of competent staff, higher expectations on the quality of lobbying, and most important, a longer attention span to the past and foreseeable evolution of policy issues. But at its best, the legislative process is a far cry from the deliberative search for agreed ends and the informed assessment of means that is postulated by the instrumentalist model.

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63. Nebraska has a one-chamber legislature, the Unicameral. NEB. CONST. art. III, § 1.

64. Cohen, *supra* note 62. Professor Cohen deplored the use of hearings as mere public echo chambers for predetermined positions and arguments. He urged the preparation of policy analyses by professional staffs not simply committed to supporting the chairman's political views, a development which has made substantial headway in some of the major Congressional committee staffs. See also Cohen & Robson, *The Lawyer and the Legislative Hearing Process*, 33 NEB. L. REV. 523 (1954).

*Lawmaking and Administration.* We do, in fact, have one lawmaking process that is held, by and large, to the requisites of rational policy-making that I have sketched. It is the administrative process. When officials are delegated the authority to perform some prescribed function, to manage a program, or to pursue some stated objective, no matter how broad their discretion may be, they are obliged to justify their actions in instrumentalist terms, as means toward a goal within the scope of their assignment. From this obligation, with or without the aid of administrative procedure acts or statutory standards of judicial review, courts have spun out various procedural duties of agencies which require them to articulate their aims and their assumptions of fact, to examine available evidence and consider alternative solutions, and sometimes to subject their hypotheses to scrutiny and possible rebuttal by interested parties. In one case of enormous practical importance which depended upon such assumptions, Congress had left it to the Environmental Protection Agency ("EPA") to delay automobile emission standards from 1975 to 1976 only if the administrator found that adequate technology would not be available by the statutory date. After much study, the administrator declined to exercise this power. The reviewing court remanded the decision to EPA in order to afford the automobile industry not only a chance to challenge EPA's methodology but also to subject it to limited cross-examination.<sup>65</sup> Judge J. Skelly Wright recently warned against implying such procedures simply from the agency's duty of rational decision.<sup>66</sup> But if Congress itself set both a pollution standard and its effective date for some less influential industry than the automobile industry, without basing the standard on any agreed methodology or without considering the industry's case against its feasibility, Judge Wright's colleagues would not hold this to deny due process even if it shut the industry down. Whatever may be required of agencies in the pursuit of stated goals, it is clear that due process imposes no such model of rational inquiry on legislative bodies that select and compromise opposing versions of truth and justice in a single act of lawmaking.

In *Townsend v. Yeomans*,<sup>67</sup> tobacco warehousemen in Georgia complained about a statute which fixed their rates and alleged that the legislature had made no effort to learn what it was legislating about. In effect plaintiffs offered to prove that the lawmakers had

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65. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

66. Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

67. 301 U.S. 441 (1937).

acted in ignorance, and it appears that they called some legislators as witnesses to the fact. They might have had a case, if the rates had been set by an administrative commission,<sup>68</sup> but as an attack on legislation the Supreme Court gave the claim short shrift. "There is no principle of constitutional law which nullifies action taken by a legislature, otherwise competent, in the absence of a special investigation," wrote Chief Justice Hughes. "[T]he Legislature . . . is presumed to know the needs of the people of the state. Whether or not special inquiries should be made is a matter for the legislative discretion."<sup>69</sup> In a more recent case, plaintiffs complained that a New York law banning the sale of alligator shoes, along with the skins of other supposedly endangered species, was enacted without an opportunity for them to offer or to dispute evidence on the question of danger to the species involved. Hearings had earlier been held on a different bill concerning the same subject matter, but in any event said the court, "there is no constitutional requirement that the legislature conduct hearings and build a record when it passes a law."<sup>70</sup>

What is true of hearings is equally true of the other prerequisites of rational policy analysis that I sketched earlier. Legislatures must follow some form of rational fact-finding, like courts and agencies, only in the rare cases when they adjudicate individual rights, as in contempt and impeachment and probably when expelling a member, but not when they legislate.<sup>71</sup> A bill need not be explained by its sponsor on introduction—it may, indeed be introduced "by request" with the sponsor's candid admission that he does not understand it—nor must it be referred to committee, nor is it necessary that passage be preceded by debate. Bills have been introduced and passed in a single day under claim of emergency and suspension of rules. A bill need not declare any purpose nor recite any legislative findings. It may be enacted by members whose minds are wholly closed to reasoned argument because of prior commitment to one point of view, ignorance and misinformation, lack of interest and lack of time, or simply because of absence of any opportunity for inquiry and debate.

Procedures like these are indefensible when one takes seriously the notion that due process commands a legislature first to agree

68. *But cf. Bowles v. Willingham*, 321 U.S. 503 (1944).

69. 301 U.S. at 451.

70. *Palladio, Inc. v. Diamond*, 321 F. Supp. 630, 633 (S.D.N.Y. 1970).

71. *Groppi v. Leslie*, 404 U.S. 496 (1972); *Powell v. McCormack*, 395 U.S. 486 (1969); cf. *United States v. Brewster*, 401 U.S. 501, 518-20 (1972) and 542-44 (Brennan, J., dissenting). Factual disputes in election contests are heard in quasi-judicial proceedings. See 2 U.S.C. §§ 381-96 (1970).

on a purpose and then to assess the efficacy of the proposed means to accomplish it. They would not be allowed in administrative rule-making—for example, if the ban on alligator shoes were laid down by a conservation commission, acting on the motion of one of its members who had been given misinformation, without knowing an alligator from a crocodile, making no effort to determine if either of them was an endangered species, and having given no prior notice permitting interested persons to submit arguments on the issue. But the distinction between the processes of legislation and the processes of its administration runs deep in constitutional law. It surfaces in two antitrust cases in which trucking companies claimed that their competitors conspired to use the machinery of government against them. In the first,<sup>72</sup> Justice Black wrote for the Court that even a campaign to obtain favorable action by deception, manufacture of bogus sources of reference, and distortion of public information had to be endured in the kind of “no-holds-barred fight” that is “commonplace in the halls of legislative bodies.”<sup>73</sup> However, the sequel case<sup>74</sup> left open the possibility of a different result when lies and misrepresentations were directed at an agency, at the instrumental process of administering a law rather than at the political process of enacting a law. The distinction is commonplace in judicial review of the actions of local governments, which typically place lawmaking and administration in the same hands—commonplace but often incoherently stated, because opinions submerge the need to distinguish carefully between an elected body’s political selection of policy goals and its execution of previously enacted policies in meaningless platitudes about presumptions of regularity on the one hand and arbitrariness on the other.<sup>75</sup>

An obligation that lawmakers design and evaluate every law as a means to an end beyond itself would demand of policy-making the rational procedures of policy implementation. If there is any doubt that due process makes no such demands on the process of political decision, the ultimate test of the theory lies in that pride and joy of western lawmaking, the popular initiative. Initiated laws like all others must meet constitutional standards. They will fail if by design or in effect they overstep constitutional bounds.<sup>76</sup>

72. *Eastern R.R. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

73. *Id.* at 144.

74. *California Transp. Co. v. Trucking Unltd.*, 404 U.S. 508 (1972).

75. See, e.g., Comment, *Quasi-Legislative Acts of Local Administrative Agencies: Judicial Review*, 7 U. SAN FRAN. L. REV. 111 (1972), and the California cases reviewed therein.

76. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (amendment to the California Constitution forbidding open housing laws); *Pierce v.*



But can it be contended that one of those standards is a rational way of matching means to ends? The initiative process flies in the face of the idea. Whatever the private goals of the sponsors, once a measure is drafted it is past systematic factfinding, analysis, amendment, or compromise. Aside from newspaper editorials or an occasional official voters' pamphlet, the debate leading to decision is left to the electioneering slogans of competing advertising firms.<sup>77</sup> Yet such a measure may repeal, alter, or contradict the most carefully studied and best designed enactment of the legislature. If this mode of policy-making lacks some of the deliberative virtues of a republican form of government, that criticism failed to move the Supreme Court in 1912;<sup>78</sup> and the California Supreme Court was surely right last December when it held that due process did not forbid the voters of San Diego to limit the height of buildings by use of a popular initiative and without any hearings or other institutional procedures.<sup>79</sup> But note again: the initiative is generally allowed for "legislative" and not for "administrative" actions.

Does constitutional law, then, demand nothing of the legislative process as a policy-making system? I trust my view of it will not strike you as hopelessly bleak, nor my defense of it as cynicism. I intend quite the opposite. If one thinks it cynical that laws need not be rational means toward high purposes, one implies that democracy must be justified by its capacity to produce such rational laws. Personally, I would rather avoid the converse that follows if it is shown that a non-democratic form of government can decree more effective measures toward more coherent national goals, as is often the case.<sup>80</sup> But in fact the law does set standards for legiti-

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Society of Sisters, 268 U.S. 510 (1925) (law requiring education in public schools only).

77. For a discussion of remedies where voters in a referendum have been misled by the wording of the ballot or other official source, see Note, *Avoidance of an Election or Referendum When the Electorate Has Been Misled*, 70 HARV. L. REV. 1077 (1957).
78. *Pacific Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).
79. *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 305, 529 P.2d 570, 118 Cal. Rptr. 146 (1974). Justice Tobriner rejected the due process claim of Building Contractors as "founded on an erroneous premise" in view of the "established constitutional principle" that notice and hearing have never been required for the enactment of general legislation. *Id.* at 211, 213, 529 P.2d at 573, 574, 118 Cal. Rptr. at 149, 150.
80. For counter-democratic implications of instrumentalist legal thinking in developing countries, see Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 18-21 (1972). Trubek's distinction between an instrumentalism of means-ends rationality and an instrumentalism of process in the

mate lawmaking, as we shall see. There is hope. Only it is not found in a duty to legislate by the methods of rational policy analysis.

Before we turn to those other standards, let us sum up the distinction between the kind of lawmaking that must be prepared to defend the rationality of its decision process and the kind that, in my view, need not do so. The distinction does not lie in the numbers of interested parties that may be affected by the decision nor in whether it rests on general or specific facts. Those lines concern the limits of the right to be heard and dispute evidence, limits developed on the foundation Justice Holmes laid down in his *Bi-Metallic* opinion.<sup>81</sup> But even though the Colorado Board of Equalization in that case did not have to listen to all the taxpayers of Denver, and thus not to any of them, it still had to use some rational process to decide that Denver had underassessed their property. Is the distinction, then, whether the policy makers are appointed or elected? Many state and local agencies are elected, presumably to reflect community desires more directly. But this does not give an elected board of equalization, or a utility commission or a school board greater freedom to proceed irrationally than their appointed counterparts elsewhere.

The duty to defend the rationality of a decision, I suggest, depends very simply on whether the policy makers are limited to prescribed aims, or whether they are free to pursue any aim of their own choice. Most lawmaking bodies have assignments which, however broadly stated, are nevertheless finite. This is true of city councils, for instance, even under constitutional home rule. Many constitutional claims in federal courts would be unnecessary if judges would first make counsel brief, for example, whether a school board has been empowered by its statute to improve the personal appearance of students or the private lives of teachers.<sup>82</sup> But state laws, whether made by legislators, by popular initiative, or even by courts, are an exercise of the state's plenary authority to address or not to address any perceived need, to pursue or not to pursue any vision of social goals, subject only to constitutional limitations. Unless, then, an impermissible goal is charged against the lawmakers, unless the attack is on the legitimacy of their policy rather than its rationality, the policy can constitutionally be a

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competitive politics of a pluralistic society is consistent with the constitutional theory discussed here.

81. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

82. See, e.g., *Neuhaus v. Federico*, 12 Ore. App. 314, 505 P.2d 939 (1973); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969).

means to do exactly what it does do, no more, no less. It cannot be considered as lacking logical relation to an end if the end can be anything that is not forbidden.

*Candor and Hypocrisy.* The response, on the part of proponents of the doctrine of instrumental rationality, is that by insisting on the identification of purposes, whatever they may be, the doctrine promotes candor in the legislative process.<sup>83</sup> Candor in giving reasons for a policy can be a mixed blessing. It may result in invalidating a policy for faulty premises even though it would be quite desirable if based on different reasons. In the administrative law area, we expect to pay this price for giving reasons. We are reminded by Judge Leventhal that the ex post facto rationalizations of counsel cannot take the place of reasoned decision-making by the agency.<sup>84</sup> But are we prepared to live consistently by the doctrine of "reasons before conclusions" even in administrative policy-making? Most law schools, to choose an example close to home, use a special admissions process for minority applicants. *Why* they do so, as every constitutional law professor knows, is debated always in terms of a justification that can survive equal protection analysis, and not in a search for agreement on the premises of the program. Arguments about the relevance of alleged cultural bias in academic and LSAT scores, about the legitimacy of compensatory preferences, about the special social contribution of minority lawyers or the pedagogic advantages of a heterogeneous classroom are pursued in law reviews, but they are not brought to a decision in the individual institution before action is taken.<sup>85</sup> Some of these arguments have merit, some do not, and a choice among them would logically affect the nature of the program. But no one expects special minority admissions to stand at one law school or fall at another on the strength of the school's means-ends analysis. What law schools know they want is a minority program, and any

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83. Gunther, *supra* note 15, at 47; Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 269, 287 n.54, 299-300 (1975).

A different argument than candor is that policies of major importance or touching sensitive rights should be required to be made only by explicit legislative enactments, so as to assure that they represent the deliberate decision of the politically responsible legislature. See Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 CALIF. L. REV. 601, 645-55 (1975), discussing precedents for this demand.

84. National Organization for Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962), citing SEC v. Chenery Corp., 332 U.S. 194 (1947), which sustained an order previously reversed for faulty premises in SEC v. Chenery Corp., 318 U.S. 80 (1943).

85. See Gellhorn & Hornby, *Constitutional Limitations on Admissions Procedures and Standards—Beyond Affirmative Action*, 60 VA. L. REV. 975, 1002-11 (1974), for proposals for bringing standards and

reason that the Court finds to be legitimate will gladly be adopted retrospectively as the reason for each school's policy.

Articulated reasons have their place in an agency's pursuit of the goals assigned to it. Pursued into the legislative process, the hope for candor is more likely to produce hypocrisy. Recitals of findings and purposes are the task of anonymous draftsmen, committee staffs, and counsel for interested parties, not legislators. Such recitals will be an attempt to provide whatever, under prevailing case law, is expected to satisfy a court. Except for this purpose, a legislator has no reason to care about them nor to debate their truth or relevance as long as he favors the bill.

It is improbable that testimony about the amount of food that was not being sold to potential black customers in segregated restaurants produced any new votes for the Civil Rights Act of 1964, not even from congressional districts that import coffee or produce Coca Cola.<sup>86</sup> Earlier, in legislating for humane methods of slaughter, a Senate committee felt obliged to add to the goal of preventing needless suffering an assertion that inhumane slaughter adversely affected public acceptance of meat products.<sup>87</sup> Congress, of course, does have to relate its bills to some function assigned to it, while a state legislature needs only to avoid forbidden ground. In its recent session, the Oregon Legislature, flushed with victory over throw-away bottles and cans,<sup>88</sup> took on aerosol sprays. The senate bill was prefaced by half-a-dozen assertions about the danger of fluorocarbons to the ozone layer, a matter which an attorney for opponents pointed out was a rather distant reason for one state to burden interstate commerce. Meanwhile, another constitutional lawyer suggested to counsel for the house committee the addition of a recital that aerosols also endanger some persons' health down on the ground in Oregon. Attention to this finding was duly recorded in the taped debate, and the senate accepted the house amendment to the findings.<sup>89</sup> Note that this repair job was wholly the work of lawyers who knew nothing about ozone or the

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procedural fairness into the admissions process. I have not heard of any university that has followed administrative rulemaking procedure in articulating its law school admissions program, despite the enormous pressure recently on admissions.

86. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, was sustained in *Katzenbach v. McClung*, 379 U.S. 294 (1964). The recitals in this instance were made in committee, not in the text of the act. For a critique of this invocation of the commerce power, see G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 217-18 (9th ed. 1975).

87. S. REP. NO. 1724, 85th Cong., 2d Sess. (1958).

88. See *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Ore. App. 618, 517 P.2d 691 (1973).

89. *DIGEST OF OREGON LAWS*, c. 366, S.B. 771 (1975).

medical effects of inhaling fluorocarbons, and it hardly affected one vote for or against outlawing aerosol cans. If the law would have been invalid with only statements about ozone, what should be its fate with the added recital? Or with no recitals at all? Should it matter to the fate of an act if statements about it are demonstrably false? We have it on the high authority of Justice Frankfurter that the truth or falsity of congressional findings in a bill was immaterial, when the Court pushed aside the attack of the Communist Party on a veritable essay of findings that prefaced the Subversive Activities Control Act of 1950.<sup>90</sup> How much attention Congress pays to such recitals was illustrated when these findings about the "world Communist movement" of 1950 were reenacted unchanged in a 1968 revision, without reference to the historic developments of eighteen years.<sup>91</sup>

The fact of the matter is that legislatures do not decide separately on the goals of a policy and on the proposed means, where to go and how to get there. The vote is on the means, not on the ends. The means are what will happen, the ends may or may not happen, depending in part on what near or distant objective one has in mind. The crucial thing is that the means themselves are somebody's end; that alone can get a bill enacted. Sometimes people want to use the car rather than walk, no matter where they may end up.

The point appears never more sharply than when the policy process consciously tries to measure its instrumental rationality, for instance, by determining the benefit-cost ratio of a proposed project. Thoughtful students of policy analysis often stress its limited role in the overall context of political decision, its function of clarifying choices rather than of demonstrating the "right" choice, particularly on the part of government staffs that are not themselves politically responsible for the final decision. When he was Deputy Director of the Budget, Defense Secretary James R. Schlesinger once commented to a Senate committee on the "ancient political tradition" which makes it more important that a widely perceived problem be addressed on the symbolic level than that the action taken have a high likelihood of success. The symbolic impulse behind much governmental action will often gain votes for "ready-made solutions in search of a problem" which their promoters and beneficiaries in and out of government may long have sought to enact or to enlarge. Schlesinger said that particularly in spending schemes, "it is an effective device to associate their programs, frequently quite irrelevant, with currently popular goals,

90. *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

91. 50 U.S.C. § 781 (1968).

frequently quite laudable, notwithstanding the fact that the proposed solution may not make even a dent in the problem. . . . The fact that an activity is indefensible in analytical terms does not mean that it will lack for defenders."<sup>92</sup> Even projects with benefit-cost ratios well below 1.0 will be enacted in the face of the knowledge that they cannot be rationalized by the most generous hopes for their ostensible purposes. Does the Constitution forbid such an enactment?

Indeed, when we turn from spending programs, whose political justification may be the very realistic one of allocating work and wealth to the suppliers of the goods or services involved—the construction or aerospace industries, farmers, even teachers or social workers—as much as any need for those goods or services, to the older kind of social legislation that places the burden of progress on those whom it regulates, a very low prospect of effectiveness may be the *sine qua non* of winning enactment of the law at all. Only after amendments excluding favored and vulnerable groups, entrusting enforcement to diffuse and feeble agencies, hedging it with slow and repetitive procedures, and assuring control over personnel and budget in safe hands can a majority be put together of those who want results and those who are willing to share in the symbolic affirmation of principle as long as it causes no practical pain. Contrary to the instrumentalist canon, the ineffectiveness of a law to achieve its goal may be itself a policy, a policy shared by the act's opponents and some of its supporters, and may be the price for permitting the law to reach enactment.

Dr. Schlesinger, I point out, was describing the policy process, not complaining about it. His point was that analysis can tell legislators when a proposal lacks rational justification, but the decision remains theirs. Consider whether such enlightenment helps or hurts the validity of an act, if we take seriously the notion that legislative acts are obliged to be rational means to their ends. Is it more rational, or less, to adopt a policy after weighing the knowledge that it does not meet utilitarian tests, than it is to adopt it in ignorance and hope? The paradox disappears when we recognize that nothing limits a lawmaker to purposes that qualify for benefit-cost analysis. People have reasons for wanting a law, and the lawmaker will see a value in meeting their wishes, quite apart from any practical good it may do. The oldest parts of the law—family law, for instance, and much of the criminal law—embody norms that are strongly held values for their own sake

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92. *Hearings on Planning-Programming-Budgeting System Before the Subcomm. on National Security and International Operations of the Senate Comm. on Gov't Operations*, 91st Cong., 1st Sess., pt. 5 at 305-11 (1969).

and not as means to a further end. Do we need, or want, a utilitarian explanation for laws that limit the legal relation of marriage to partners of opposite sex, or distribute intestate property by degree of kinship?

When the challenge is to a law that reflects such a non-rational human impulse, judges will sometimes try to credit the law's acceptance of that impulse with being itself a rational policy. For instance, many people no doubt support the death penalty from a sense that justice demands it in outrageous cases more than they really care how effective it is as a deterrent, but Justice Stewart finessed doubts about a non-pragmatic premise like retribution by finding its recognition in the law useful after all: "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."<sup>93</sup>

Again, few laws have been longer in search of a purpose than the laws against pornography. A majority of the Court has sustained these laws as reflecting "imponderable aesthetic assumptions" about morality and the style and quality of life, without inquiry as to whether the lawmakers had in fact reached agreement on any diagnosis of the supposed harm or the efficacy of censorship as a cure.<sup>94</sup> This is an approach very different from the search for rationality beyond mere Victorian taboos in the pregnant teachers' case.<sup>95</sup> And indeed, if the impulse for laws that protect wilderness areas, endangered species, historic places, or the appearance of cities, or that forbid cruelty to animals, could be pronounced rational only on the ground that it gives effect to another order of human self-satisfaction, the whole instrumentalist notion turns into tautology. On that score, it is quite as rational to reinstitute public hangings as to abolish the death penalty, or to raise revenues by licensing bullfights as to adopt a humane slaughter act, if this is what people really want. If there are limits, they must be found elsewhere than in a test of instrumental rationality.

Finally, think again of the problems of time and change and inaction. If a court finds a law unconstitutional because facts have

93. *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring). The futility of searching for means-ends rationality in our ambivalence toward punishment for crime was exemplified in the Oregon Constitution, where until 1964 the death penalty for murder was enshrined in the Bill of Rights along with the command that "laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." ORE. CONST. art. I, § 15 (1963).

94. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

95. 414 U.S. 632 (1974).

changed, this implies—using our premise that the government must have failed a duty to follow the Constitution—that there is a constitutional obligation to make new laws. But what laws, and when is the obligation met? Suppose that after the Carolene Products Company changed the labels on its cans so that no consumer could possibly be confused, a legislator proposed to repeal the ban on filled milk because it no longer served its original purpose. May a legislative committee shelve the bill without hearings because dairy farmers object to new competition? May it hold hearings to analyze the economic impact of repeal and then shelve the bill? Or is the legislature obliged to reenact the existing law in order to base it on this changed purpose—for, after all, the inaction of a committee is not the rational judgment of the legislature as a whole? The Federal Trade Commission might be obliged to consider the change in labels, because the Commission's assignment does not include subsidizing dairy farmers; but a legislature, I repeat, is not the FTC.

Suppose, again, that there is widespread agreement on a social goal, but that legislative agreement is not reached on the means. Each house, after careful study, passes a rational bill which, however, proves unpersuasive to the other house, or a compromise is vetoed because it diverges from a third rational plan of the executive. Of course we want more, we want action; but when there is no agreement on exactly what action, can we label the outcome unconstitutional for lack either of instrumental rationality or of due process? And with what consequence? A court cannot easily provide a substitute for a law which has not been made; at least it cannot outside the traditional areas of judge-made common law and equity. A few years ago, the Florida Supreme Court struck down an old state statute against abortions in a judgment with only prospective effect and declared that, pending enactment of a new statute, prosecutions might proceed under what the court called the "common law offense of abortion."<sup>96</sup> Could the legislature have "enacted" this unwritten stop-gap into permanent law simply by failing to agree on a new statute? Or did this mode of making a criminal law, more than insufficient rationality of any law that the legislature might make, represent a denial of the due process of lawmaking?

That brings us to the last stage of this excursion into constitutional theory.

#### IV. LEGITIMACY AND DUE PROCEDURE

If the dogma that due process requires every law to be a rational means to a legislative end is itself not a rational premise for judi-

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96. *State v. Barquet*, 262 So. 2d 431, 437 (Fla. 1972).



cial review, and if it is even less plausible as a constitutional command to lawmakers, then what use is the due process clause for lawmaking? The time has come to look the clause itself in the eye.

To propose a look at the due process clause, let us admit, casts doubt on this whole theoretical exercise. For that is not what one does in constitutional law. The fact that the political decisions about how we were to govern ourselves were written down after much debate and drafting in formal constitutions in 1776 and 1787, in amendments in 1791 and 1868, and at various other times, at first gave strength and legitimacy to judicial enforcement of lawful government but has since come to be regarded as something of an embarrassment. For how can we in the late 20th century treat our most crucial legal and political issues as the interpretation of these texts enacted by a few men, and no women, in a very different kind of society one hundred or two hundred years ago? Yet the texts are there, and other texts that might be there are not, and the machinery to change the texts exists and has often been used. It is a dilemma, the fundamental dilemma I suggested at the outset in saying that the Constitution is not common law and calling Justice Jackson to my defense.

Of course, our intellectual resources rise easily to the task. The task, as we lawyers see it and have taught everyone else to see it, is judicial review. It requires room for judicial decision. And the first thing you must do to have room for decision under a written text—any text, be it a contract, a will, a statute, or a constitution—is to find that it is ambiguous at the least, preferably that it is obscure, and best of all, that it is deliberately broad and general for use in a variety of unforeseeable circumstances sometime in the future. To assume that the draftsmen meant something precise of which we cannot now be certain is less satisfactory than to discover that they themselves did not agree, or agreed only on the most Platonic generalities, for this discovery lets us act not from an admission of ignorance but in the happy execution of their very plan. Particularly in "due process," the commentators, many of whom have also been judges, have seen the most Delphic among the Constitution's terms of "convenient vagueness,"<sup>97</sup> phrased with "majestic" generality<sup>98</sup> and "sententiousness."<sup>99</sup> "Stately admoni-

97. Hough, *Due Process of Law—To-Day*, 32 HARV. L. REV. 218 (1918). See also Frankfurter's phrase, "purposed vagueness," *supra* note 6.

98. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 784 (1971).

99. Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696 (1946), reprinted in L. HAND, *THE SPIRIT OF LIBERTY* 207 (1952).

tions," Judge Learned Hand called them, "with only that content which each generation must pour into them anew in the light of its own experience."<sup>100</sup>

Far be it from me to say that a text is informative when so many, for so long, have found it to be only evocative. I suggest merely that a clause which forbids Government to deprive persons of life, liberty, or property without due process of law appears, at least as a point of departure, to concern the process by which Government impinges on these interests of the individual rather than the reason why it does so.<sup>101</sup> The clause does not forbid the taking of life, liberty or property—this was, and is, the central technique of criminal and civil law and most administrative regulations—rather, it forbids doing so by an unlawful process. And indeed, without here going into the historical origins of the clause, among most of those who have done so it is commonly acknowledged that due process originally referred to lawful procedure and was generally so understood for a hundred years after independence.<sup>102</sup>

At its core, "process" meant trial, judicial proceedings, as it does today in French and in German; and the first edition of Story's treatise on the Constitution in 1833 disposed of fifth amendment due process with the single sentence: "This clause in effect affirms the right of trial according to the process and proceedings of the common law."<sup>103</sup> From this core concept, it is no great leap to extend due process also to standards for administrative and other procedures, and one only has to go slightly further to hold that a legislature cannot enact any procedure which it chooses into due process of law.<sup>104</sup> The evident focus of the due process clause on

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100. L. HAND, *The Contribution of an Independent Judiciary*, in *THE SPIRIT OF LIBERTY* 180 (1952).

101. One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning.

*Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting). Justice Black objected to the fabrication of a constitutional "right of privacy" beyond the fourth amendment. *Id.* at 509, 510.

102. See, e.g., 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 856 (1971); A. HOWARD, *THE ROAD FROM RUNNYMEDE* 363 (1968); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 1972 WASH. U.L.Q. 421 n.11; Hough, *supra* note 94, at 223.

103. Quoted in Hough, *supra* note 94, at 222.

104. The much larger leap from provisions which in terms hold officials within the law and legal procedures to a generalized review of substantive legislation was taken in two steps. The issue was first

procedure can be somewhat blurred by tracing its relation to the earlier and more common clauses which held that Government had authority to act only according to the "law of the land," but this still does not take us beyond a claim to laws properly made. These clauses insisted on government according to law, but they hardly meant that the elected assemblies of a newly self-governing people, any more than Parliament before them, were not to be able to make new laws. Even Corwin conceded that Sir Edward Coke, who provided the crucial link between the Magna Carta and our 18th century constitutional clauses, was concerned only with imposing procedural and institutional restraints on government; the natural rights philosophy of John Locke, while important to American constitutionalism, cannot fairly be assigned to the guarantees of procedure and legality expressed as "due process" and "law of the land."<sup>105</sup> As to the notion that either clause commanded legislation to be rational, not merely in the sense of avoiding self-contradiction and impossibility of compliance, but as reasonable means to an end, these phrases seem an unlikely way to state such a command on the part of men who were eminently able to put their political and legal prescriptions into English.

*"Process" as Process.* The question before us is not what substantive rights may be found elsewhere within or outside of the Constitution, but what pertinence the due process clause may have for lawmaking when the constitution-makers, at the time of the fourteenth amendment as much as at the time of the fifth, gave the term "due process" no more than a procedural connotation.<sup>106</sup> To extend it from procedure to substance was an aberration of the 1890s. As Professor Bickel reminded us, neither Justice Brandeis nor Justice-to-be Frankfurter thought us intellectually bound to this,<sup>107</sup> nor need we be bound to rely only on due process to hold the states to the privileges and immunities of the Federal Bill of Rights.<sup>108</sup> Of course, precedent being what it is, I am not now

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whether, contrary to the view of, for instance, Alexander Hamilton, these provisions ran against an act of the legislature at all. The subsequent non sequitur was that, if they did, they controlled not only novel and unfair procedural legislation but substantive legislation as well. See 2 B. SCHWARTZ, *supra* note 102; HOWARD, *supra* note 102, at 303-05.

105. CORWIN, *LIBERTY AGAINST GOVERNMENT* 50-51 (1948).

106. Frank & Munro, *supra* note 102.

107. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 26, 186 n.34 (1970); see *Whitney v. California*, 274 U.S. 357, 372-73 (1927).

108. Such substantive rights as were meant to be placed beyond deprivation by the states are plainly better described by the words "privileges" and "immunities" than as interests in life, liberty or property which

speaking of how to brief your first constitutional case. But since we are engaged in an excursion into constitutional theory, let us examine the implications if we had followed Brandeis and returned "due process of law" to its procedural meaning. What might "due process of law" mean in lawmaking?

The obvious answer is that government is not to take life, liberty, or property under color of laws that were not made according to a legitimate law-making process. There is nothing very obscure in this reading of "due process," certainly nothing as obscure as finding in those words, or in "law of the land," a command that a validly made law is valid only as long as it serves the lawmaker's supposed purpose, or perhaps some different contemporary purpose. It means simply that the relevant question of due process in lawmaking is never what law was made, but how it was made.

Of course, reading "process" to mean "process" requires us to decide which lawmaking processes are legitimate and which are not. Even if the answers are not always self-evident, at least this reading poses the right questions. This is so not simply because we follow the procedural meaning of "due process"; they are the right questions because the answers make sense as constitutional direc-

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government may take if it employs the correct process, although "due process" could incorporate the *procedures* provided in the Bill of Rights. Due process became the vehicle for extending federal substantive guarantees to the states because the Slaughter-House Cases, 83 U.S. 36 (1873), in rejecting a broad, open-ended claim of business "privileges and immunities", had left those words without practical meaning. But the Slaughter-House Court, intent on denying the much broader reading, seems not to have considered whether the "privileges and immunities of citizens of the United States" might mean those which the Constitution gave Americans against the Government of the United States, i.e. the Bill of Rights. Perhaps this interpretation of "privileges and immunities" cannot fairly be attributed to the draftsmen of the fourteenth amendment in view of their references to Judge Bushrod Washington's (itself questionable) reading of the similar words in Article IV when sitting as a circuit judge in *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3,230) (C.C.E.D. Penn. 1823). See, e.g., CORWIN, *supra* note 105, at 118-19; Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967). But see *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J., concurring). The high-water mark of the last effort to find a new theoretical footing in the privileges and immunities clause came in *Edwards v. California*, 314 U.S. 160 (1941), in concurring opinions of Justices Jackson and Douglas, joined by Justices Black and Murphy. Professor Kurland recently suggested revival of the privileges and immunities clause, but apparently as a source of claims outside the first eight amendments. Kurland, *The Privileges and Immunities Clause: "Its Hour Come Round At Last"?*, 1972 WASH. U.L.Q. 405.

tives for the conduct of government in a way in which the formulas of substantive judicial review for rationality do not. It makes little sense to pretend that the fifth and fourteenth amendments instructed lawmakers constantly to review all laws for agreement on their purposes and their probable effectiveness; but it is not beyond the theoretical capacity of officials to know proper from improper processes of government, regardless of their willingness to abide by this knowledge in practice.

For keep in mind that the manner in which our governments make law is itself governed by law. The legitimacy of government—its composition, selection, and procedures—occupies a large part of the federal and state constitutions and, in the case of local governments, is grounded in statutes and charters. Laws govern even lawmaking by the people themselves. Some of these laws define the legitimacy of lawmaking institutions, for example the number of their members, their qualifications, their election, the length of their term in office. Others define the prerequisites of lawmaking procedure; for instance, the central concept of enactment by a majority of a legal quorum, or sometimes a larger number; passage of the same text by two separate houses; the assent of an independent executive or reenactment after consideration of his objections. What is not fixed in constitutions and statutes is often spelled out in the rules of the lawmaking body itself. Bribery, the classic threat to the integrity of government, is universally outlawed by statute or constitution. The Court has spoken of the “*due*” functioning of the legislative process under the speech and debate clause.<sup>109</sup>

Two things are striking about this body of rules for the lawmaking process. One is that over the years its successive authors have measured the process, explicitly or implicitly, by the standard of its legitimacy—the basic constitutional standard of democratic accountability or, if you will, of a republican form of government.<sup>110</sup> That is not a universal practice in the world. The architects of our system have identified what from time to time they have perceived as prerequisites of legitimate lawmaking and as threats to its achievement, they have debated alternative solutions both in institutional and in procedural forms, and they have known how to state these solutions with considerable precision and detail. The second striking thing is that these rules of the lawmaking process, with some exceptions, are followed as a matter of course, unquestion-

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109. U.S. CONST. art. I, § 6; *United States v. Brewster*, 408 U.S. 501, 516 (1972) (emphasis in original).

110. U.S. CONST. art. IV, § 4.

ingly, not with a constant weighing of possible sanctions for their violation. We would not say this with equal confidence about daily practice in the processes of criminal and administrative law. In short, due process in lawmaking in many, if not all, respects is a very concrete, well understood set of institutional procedures.

This conscious and deliberate legitimization of the lawmaking process has never come to an end, frozen in the forms of 1789 or of 1868. The constituency entitled to select and to retire its lawmakers has been progressively enlarged by the fifteenth, the nineteenth, the twenty-fourth and the twenty-sixth amendments. Some states, such as my own State of Oregon, found means to enforce equal apportionment of legislative representatives before the Supreme Court extended this political equality to all states. In the 19th century, the reaction to legislative recklessness, ignorance, log-rolling, and corruption led to constitutional strictures on the forms and procedures of enactment, some of which we now find inappropriate.<sup>111</sup> A number of states turned to the popular referendum as a safeguard. Waves of reform have been aimed at local institutions and processes, with good reason. Not all of these efforts have proved wise, and contradictory views have prevailed in different states; but the impulse to secure responsible government has not run its course.

Indeed, we presently live in a period of the most intense attention to the lawmaking process since the burgeoning of new legislation and administrative regulation thirty years ago led to the Congressional Reorganization and Administrative Procedure Acts of 1946.<sup>112</sup> By the Legislative Reorganization Act of 1970 and its sequels, Congress has opened many previously closed proceedings to public scrutiny, required members to cast recorded votes, and surrounded committee hearings and committee action with new safeguards of notice and rights of minority participation. It has equipped itself with procedures and professional staff intended to allow both majority and minority members to deal rationally with such problems as the economic impact of the budget and the consequences of technological changes if they so choose.<sup>113</sup> Environmental impact statements are required for agency proposals to Con-

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111. See, e.g., Nutting, *The Enrolled Bill and the Validity of Legislation*, 15 NEB. L. BULL. 233, 238 (1937).

112. Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified in scattered sections of 2, 15, 31, 33, 40 U.S.C.); Administrative Procedure Act, ch. 324, 60 Stat. 237 (codified in scattered sections of 5 U.S.C.).

113. Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C.A. §§ 1301 *et seq.* (1975); Technology Assessment Act of 1972, 2 U.S.C. §§ 471 *et seq.* (Supp. IV, 1974).

gress as well as for administrative actions.<sup>114</sup> Many states have seen the same efforts to strengthen the institutional capacities of lawmaking bodies and also their accountability, through new laws regarding open meetings, open records and conflicts of interest. Some require that every bill carry an estimate of its cost.

Of course, our lawmaking process is not about to become perfectly responsible, perfectly accountable, perfectly democratic, even if these ideals did not conceal unresolved contradictions.<sup>115</sup> The point is, rather, that the process everywhere is governed by rules, that these rules are purposefully made and from time to time changed, and that most of them are sufficiently concrete so that participants and observers alike will recognize when a legislative body is following the due process of lawmaking and when it is not. There is generally no reason to doubt what process is called for. If a legislative body fails to reapportion itself when required, if it stops the clock in order to enact bills after the constitutional deadline,<sup>116</sup> if absent members are counted as part of a quorum or as having voted, if impractical requirements for reading bills are ignored, the participants know that they are not complying with the constitution or can readily be reminded of it by anyone. The same is true of legislative procedures governed by rules other than a constitution, and of local lawmaking bodies. Those who cut procedural corners will argue practical justifications; they will deny culpability if no substantive injustice results, and the fact that improperly made laws are not invalidated no doubt encourages this pragmatic view; however, they will not claim ignorance of the rules.

The problem with due process in lawmaking lies in the consequences of its violation. When a law is promulgated without compliance with the rules of legitimate lawmaking, is it not a law? Remarkably, we have no coherent national doctrine on this fundamental question. Judicial views on allowing a law to be attacked for faulty enactment differ from state to state and with the nature of the asserted fault; most courts and commentators find it improper to question legislative adherence to lawful

114. *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972); National Environmental Policy Act, 42 U.S.C. § 4332(C) (1970).

115. See Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PENN. L. REV. 810 (1974) with respect to Congress.

116. See *State ex rel. Cline v. Schricker*, 228 Ind. 63, 88 N.E.2d 746 (1949), rehearing denied, 89 N.E.2d 547 (1950). When transcription of debates spreads to state legislatures, it can cause the demise of such procedural cheating. See, e.g., Johnston, *The Legislative Process under the 1970 Illinois Constitution*, 8 JOHN MARSH. J. PRACT. & PROC. 251, 261 (1974-75).

procedures.<sup>117</sup> This reluctance is often phrased as a problem of proof, or of respect between coordinate branches, but these are rationalizations. Neither problem keeps courts from insisting on such adherence by executive officers<sup>118</sup> or by local lawmakers, and those who oppose judicial review of faulty lawmaking on evidentiary grounds will equally oppose it on uncontested pleadings or stipulations.<sup>119</sup> Fear of legislative resentment at judicial interference is not borne out by experience where procedural review exists, any more than it was after the Supreme Court told Congress that it had used faulty procedure in unseating Representative Adam Clayton Powell.<sup>120</sup> It is far more cause for resentment to invalidate the substance of a policy that the politically accountable branches and their constituents support than to invalidate a lawmaking procedure that can be repeated correctly, yet we take substantive judicial review for granted. Strikingly, the reverse view of propriety prevails in a number of nations where courts have never been empowered to set aside policies legitimately enacted into law but do have power to test the process of legitimate enactment.<sup>121</sup>

In any event these are problems of judicial review, and in our present theoretical excursion they are secondary to what the Constitution demands of lawmakers. We do not assume that a law has been constitutionally made merely because a court will not set it aside, nor does the Supreme Court,<sup>122</sup> despite Holmes's dictum

117. See Grant, *Judicial Control of Legislative Procedure in California*, 1 STAN. L. REV. 428 (1949); Lloyd, *Judicial Control of Legislative Procedure*, 4 SYRACUSE L. REV. 6 (1952); cf. Comment, *Constitutional Provisions Regulating the Mechanics of Statutory Enactment in Oregon—Effect of Enrollment*, 27 ORE. L. REV. 46 (1947).

118. A recent decision insisting on precise procedures for exercising a cabinet officer's discretion is *United States v. Giordano*, 416 U.S. 505 (1974) (wiretap authorization by attorney general).

119. See Grant, *supra* note 117, at 447-48.

120. *Powell v. McCormack*, 395 U.S. 486 (1969).

121. See Dietze, *Judicial Review in Europe*, 55 MICH. L. REV. 539, 541 (1957); M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 99 n.8 (1971).

122. In *Field v. Clark*, 143 U.S. 649 (1892), appellants argued that an enrolled bill which omitted a section actually passed by both Houses of Congress did not become law by the President's signature. The Court said:

In view of the express requirements of the Constitution the correctness of the general principle cannot be doubted. There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress.

*Id.* at 669. But the Court held that the error could not be proved on the evidence of the legislative journals, at least in any matter in



that law is only the prophecy of what courts will do.<sup>123</sup> Other participants than courts have the opportunity, and the obligation, to insist on legality in lawmaking. When an objection is raised on a significant point of procedure in the Congress, the presiding officer and the members are obliged to address the point as one of legal principle, and they quite generally do so.<sup>124</sup> A governor or a President ought to veto, on constitutional grounds, a bill that he knows to have been adopted in violation of a constitutionally required procedure, even though the courts would not question its enactment. If an attorney general advises prosecutors not to enforce a law enacted with the clocks stopped after a constitutional deadline, he acts to maintain due process despite the fact that a conviction under the law would be sustained. Congress itself prefers to treat an improperly made act as never having become law even though the courts might not do so.<sup>125</sup> It is not mere theory to distinguish between constitutional law and judicial review.

*The Problem of Relief.* Yet the question of the consequences of noncompliance remains an obstacle to simply equating due process and compliance with prescribed rules for lawmaking. For the due process clauses do not command compliance with legitimate proce-

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which the Constitution did not require that they be entered. *Id.* at 670. Similarly, in *United States v. Ballin*, 144 U.S. 1 (1892), the Court took for granted that the presence of a quorum and the vote required for passage were essential to the validity of the challenged statute, and it assumed that it might examine the journals for a vote on a roll call; however, the Court refused a challenge to the speaker's count of a quorum as reported in the journals.

During the same era, the Supreme Court enforced state constitutional requirements in cases where the state's practice included judicial enforcement. *Post v. Supervisors*, 105 U.S. 667 (1881); *Town of S. Ottawa v. Perkins*, 94 U.S. 260 (1876).

123. Holmes, *supra* note 1, at 461.

124. Of course, this does not mean that their arguments or votes are *motivated* by the merits of the procedural issue when it arises in a strongly political or substantive context, such as the issue of changing the Senate's rule on cloture at the beginning of a new session, but even such debates must be cast in terms of procedural principle. With respect to the debate in the House of Representatives in Adam Clayton Powell's case, see Linde, *Comment on Powell v. McCormack*, 17 U.C.L.A.L. Rev. 174 (1969).

125. In 1963, Congress reenacted in its entirety an act of the previous session in which one provision was discovered to have been enrolled in error, after signature by the President. The committee report suggested complete reenactment because the rule of *Field v. Clark* that federal courts will not look behind the enrolled bill would not apply to Congress itself. See note 122 *supra*. "Implicit in full reenactment is the legal conclusion that a bill not passed by Congress is not law, no matter who signs it . . ." S. REP. NO. 297, 88th Cong., 1st Sess. 3 (1963).

dures in the abstract; they state that no person shall be deprived of life, liberty, or property without such compliance. The guarantee runs in favor of the individual. But courts will not relieve individuals of the application of a law on every showing that it was improperly enacted. They are reluctant to visit the past sins of its legislative fathers on an otherwise inoffensive statute, especially when to do so seems a windfall for an undeserving but resourceful litigant. It is not unlike the problem of letting the criminal go because the constable blundered,<sup>126</sup> only, in the case of a statute, the consequences are far wider. This, and not problems of proof or institutional deference, is the practical reason to withhold judicial review. But to deny an injured party relief from an improperly made law means either that courts will tolerate violations of due process of law, or else that every breach of the prescribed process does not fall short of due process in the constitutional sense.

The second of these will seem the more appealing solution, as it has been for the judicial view of due process in criminal and in administrative law. It sacrifices reading due process of laws to require adherence to law, and instead calls for deciding which standards of the lawmaking process are essential to a valid enactment and which are not. Due process of lawmaking will include some but not all of the rules governing the particular lawmaking body; it will also provide a constitutional standard below which no lawmaking process may fall. Of course, courts, as they have done in the past, can continue to insist directly on compliance with rules beyond the demands of due process where this is the practice. Examples of this are rules governing the subject and titles of bills or the reading of proposed ordinances at properly convened meetings. What the due process clauses add to such rules is the claim to protection against injury to private life, liberty, or property, beyond the injury to the societal interest in legitimate government; and fourteenth amendment due process can add a federal floor under law making processes in the states.<sup>127</sup>

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126. See *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.).

127. The text paragraph is illustrated by *Londoner v. City & County of Denver*, 210 U.S. 373 (1908). A property owner objected to a tax assessment because the decision to pave his street had been made without the prior petition of landowners required by state law and because he had been denied an opportunity for a hearing. The Supreme Court held that since federal due process would not require a petition or other procedures before such a legislative decision, the failure to follow the procedure actually prescribed could not be a violation of due process; however, due process entitled the taxpayer to a hearing on his individual assessment.

One federal court has recently said that a federal due process issue

This leaves a heavy agenda for due process, even when we follow Brandeis and deny the clause any concern with what was done, but solely with how it was done. The agenda encompasses standards and remedies for the legitimacy of all lawmaking processes, including those of local governments and of boards and commissions with lawmaking authority, though these need not all be identical standards or remedies. Yet many items on the agenda are not new to judges or lawmakers, though they have presented themselves under other labels than due process and have not been related to each other in any systematic way. State courts have long struggled to draw a line between fatal and non-fatal departures from the prescribed process by means such as labeling some constitutional provisions "mandatory" and others merely "directory," a practice Cooley warned against a century ago.<sup>128</sup> The draftsmen of open meeting laws and conflict of interest laws debate what consequences should attach to non-compliance, and where they provide no answer, judges must.<sup>129</sup> Courts have said that duress and coercion will not invalidate a law when they have meant merely political pressures by lobbying groups or strike threats by public employees;<sup>130</sup> but our theory of due process has been spared the test of laws made in chambers occupied by armed groups, though a Southern view disputed the valid ratification of the fourteenth amendment itself on similar grounds.<sup>131</sup> In theory, valid lawmaking presupposes that there is a legitimate lawmaker before any procedure is undertaken, and local enactments are sometimes set aside if a participant was legally unqualified; but this is not done

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may be presented by the failure of a state to follow its own rules of law, *Field v. Boyle*, 503 F.2d 774, 779, n.6 (7th Cir. 1974), but there appears to be no precedent to support this dictum.

128. See Dodd, *Judicially Non-Enforcible Provisions of Constitutions*, 80 U. PA. L. REV. 54, 77 (1931), quoting I. COOLEY, *CONSTITUTIONAL LIMITATIONS* 159-60 (8th ed. 1927). Dodd reported that a half a dozen states followed California in inserting in their constitutions express declarations that all constitutional provisions were mandatory. *Id.* at 79.
129. See Note, *Conflicts of Interest of State Legislators*, 76 HARV. L. REV. 1209 (1963); Note, *Conflicts of Interest of State and Local Legislators*, 55 IOWA L. REV. 450 (1969).
130. See, e.g., *County of Los Angeles v. Superior Court*, 13 Cal. 3d 721, 532 P.2d 495, 119 Cal. Rptr. 631 (1975); *Dallasta v. Department of Highways*, 153 Colo. 579, 387 P.2d 25 (1963).
131. But cf. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). There the Supreme Court held that the legal outcome of an armed conflict over the government of an entire state was a question for Congress and the President. In a federal court, this case implicated the political structure of federalism, and, of course, it antedated the due process clause of the fourteenth amendment, but a state court determining due process under a state's constitution would have a harder case.

with statutes. Again, the practical consequences make invalidation seem too drastic a sanction. It was a foregone conclusion, when the Supreme Court held most state and local legislatures to be illegally constituted, that the laws made by these unconstitutional bodies would not for that reason be held void, a result which state courts had to rationalize in some fashion long before *Reynolds v. Sims*.<sup>132</sup>

The scope of the proper remedy is a more difficult question than any doubt about what process of lawmaking was due, perhaps the most difficult question on the agenda. The apportionment cases illustrate reform through prospective orders, as do many open meeting statutes, and New Jersey has a unique declaratory action to review compliance with legislative procedure;<sup>133</sup> but the conditions for granting or for denying relief against the unlawfully made law lack principled explanation. The history of judicial fears for the reliability and stability of laws is as old as the history of judicial review. Seven years after *Marbury v. Madison*,<sup>134</sup> Marshall, in *Fletcher v. Peck*,<sup>135</sup> argued at length why a law once made could not be set aside for having been procured by bribery and corruption. The holding, indeed, went further: although a newly elected legislature had described its predecessors' corruption as tantamount to usurpation, it could judge the validity of a law enacted by its predecessor even less than a court might do, if repeal would upset vested rights.<sup>136</sup> How either courts or legislatures could cope with the illegitimate offspring of systematic corruption troubled the Justices throughout the 19th century.<sup>137</sup> It is ironic

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132. 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968); *Ryan v. Tinsley*, 316 F.2d 445 (6th Cir. 1963); cf. *Blair v. Haynes*, 374 F. Supp. 913 (W.D. Mo. 1974).

Judicial passivity in the face of a legislature's extreme departure from its constitution by persistently refusing to reapportion its districts can only be explained by admitting that there are serious violations of constitutional process which courts will not correct, not by minimizing the fundamental illegitimacy of the process.

133. See Application of McGlynn, 58 N.J. Super. 1, 155 A.2d 289 (1959); Grant, *New Jersey's "Popular Action" in Rem to Control Legislative Procedure* 4 *RUTGERS L. REV.* 391 (1950).

134. 5 U.S. (1 Cranch) 137 (1803).

135. 10 U.S. (6 Cranch) 87 (1810).

136. Marshall speculated that to upset rights acquired under an unlawfully made law might inherently be beyond the "nature of the legislative power" even "were Georgia a single sovereign power," apart from the constraints of the federal contract clause on which he rested the Court's decision. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). See MAGRATH, *YAHOO* 128-39.

137. See, e.g., J. FRANK, *JUSTICE DANIEL DISSENTING* 204-12 (1964); McCurdy, *Justice Field and the Jurisprudence of Government-Business Rela-*

that the very act which in the Slaughter-House Cases<sup>138</sup> set the Supreme Court upon its long struggle for a theory of the fourteenth amendment was, in the words of a Louisiana court, the product of "a wholesale bribery concern;"<sup>139</sup> yet in all the debate about the privileges and immunities of the New Orleans butchers there was no discussion of whether a law thus bought and paid for might thereby be taking their liberty or property without due process. Again, it is judicial review and invalidation that is problematic, not the standard of legitimacy, for no one defends legislation by bribery as the due process of lawmaking.

Despite the reluctance to upset improperly made laws, however, efforts to tighten standards at other points of the policy process are eroding the bases of total non-intervention. When Brandeis mused about procedural due process in 1927, the impropriety of paying a mayor on the basis of fines collected from the enforcement of an ordinance might still be limited to his judicial or "quasi-judicial" role,<sup>140</sup> but fifty years later there is little doubt that the principle extends to the council members that legislate the ordinance. The doctrine that holds government agencies to their own rules has not stopped with adjudications but applies also to delegated policy-making.<sup>141</sup> The Supreme Court holds Congress to its own rules in the case of investigations.<sup>142</sup> Through the devices of declaratory judgment and allowing legislators standing as plaintiffs, as well as by decisions of concrete claims,<sup>143</sup> both courts and the political branches have accepted review of the policy process to the point that pretexts of institutional deference can no longer cover the hard issues of relief.

On another front courts are attacking the lawmaking process by pushing it toward forms of adjudication, for instance in land-use planning.<sup>144</sup> The same thrust is implicit in the assault on

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tions: *Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975).

138. 83 U.S. (16 Wall.) 36 (1873).

139. See Franklin, *The Foundations and Meaning of the Slaughterhouse Cases*, 18 TUL. L. REV. 1, 25 n.87 (1943); Durbridge v. The Slaughterhouse Co., 27 La. Ann. 676 (1875).

140. *Tumey v. Ohio*, 273 U.S. 510 (1927).

141. See, e.g., *Berends v. Butz*, 357 F. Supp. 143 (D. Minn. 1973).

142. *Christoffel v. United States*, 338 U.S. 84 (1949).

143. E.g., *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973) (claim to funds "impounded" by the President); cf. *Train v. New York*, 420 U.S. 35 (1975); *Powell v. McCormack*, 395 U.S. 486 (1969); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975 (1974) (state senator has standing to challenge item veto).

144. See, e.g., *South Gwinnett Venture v. Pruitt*, 482 F.2d 389 (5th Cir.

"conclusive presumptions" which the Supreme Court has levied against disfavored legislative generalizations. The concept is unpromising as a guide for telling lawmakers when due process does or does not let them proceed by general laws, not much better than telling them not to legislate irrationally, but at least it purports to concern the process of policy formulation, not the policy.<sup>145</sup>

Still another item for the agenda is the composition of lawmaking bodies, in particular the delegation of policy choices from po-

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1973); *Fasano v. Board of County Comm'rs*, 264 Ore. 574, 507 P.2d 23 (1973); Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA LAW. 50 (1974). For a critique of court-imposed judicialization of administrative rulemaking, see Wright, *supra* note 66.

145. The experiment with "conclusive presumption" doctrine as an alternative to "irrational classification" has met a critical reception. See, e.g., Sewell, *Conclusive Presumptions and/or Substantive Due Process of Law*, 27 OKLA. L. REV. 151 (1974); Note, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: from Rodriguez to La Fleur*, 62 GEO. L.J. 1173 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975). A government cannot by assertion in a law establish a fact whose existence is deemed constitutionally required for the validity of the law, e.g. that weapons or drugs have moved in interstate commerce. See *Tot v. United States*, 319 U.S. 463 (1943); cf. *Leary v. United States*, 395 U.S. 6 (1969). If the pertinence of the supposedly "presumed" fact derives, not from some external requirement, but only from the purposes attributed to the lawmaker, the doctrine has the same shortcoming as review for rational classification. If, on the other hand, the Court seriously means to develop a class of decisions that may not be made by general criteria but only by individual adjudications—a true due process issue—it faces a hard task in defining this class of decisions by criteria expressed for use not merely by itself, but by lawmakers and lower courts. Compare *United States v. Brown*, 381 U.S. 437 (1965) (statutory disqualification of Communists from union office held unconstitutional as a bill of attainder) with *Board of Governors v. Agnew*, 329 U.S. 441 (1947) (disqualification of underwriters from bank directorship sustained) and *Korematsu v. United States*, 323 U.S. 214 (1944) (no individual determinations required to relocate citizens of Japanese descent during war with Japan); cf. *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892 (2d Cir. 1960) (rulemaking sufficient to disqualify commercial pilots at age 60); *Aronstam v. Cashman*, 132 Vt. 538, 325 A.2d 361 (1974) (compulsory retirement of judges at age 70 not an invalid conclusive presumption). The Court itself has rested many of its best known constitutional doctrines on presumptions about human nature not subject to proof or rebuttal in a concrete case, e.g. the adverse impact of segregation on education, the "chilling effect" of some regulations on speech, or the deterrence of unlawful law enforcement by excluding illegally obtained evidence—a regrettable but widely approved style of explanation. See Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 238-42 (1972).

litically elected legislatures to agencies composed of the designated representatives of interest groups. An example of this is the role given union leaders and business spokesmen in the 1971 Pay Board.<sup>146</sup> Similarly, a New Jersey court faced a true dilemma of democratic theory when the most personally concerned and active proponent of a zoning amendment won election to the borough council; the court invalidated the ordinance because of his participation.<sup>147</sup> Another New Jersey court recently took the wrong road, I think, in reviewing a statute which specified the interest groups that alone could nominate appointees to the state Fish and Game Council; the court decided that the complaining parties' right to possible service on the board, but not their right to disinterested policy-making, invalidated the statute.<sup>148</sup>

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146. In *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, (D.D.C. 1971), Judge Leventhal reserved his doubts on this issue because plaintiffs had not argued it, "possibly because the Union has a different litigating interest." *Id.* at 763. Perhaps the validity of the Pay Board's power over wages in the private economy could be saved by its theoretical subordination to the Cost of Living Council. A cognate problem is presented by collective bargaining in the public sector, particularly when policies other than wages and benefits are involved. See Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); Project, *Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A.L. Rev. 887 (1972).

147. *McNamara v. Borough of Saddle River*, 60 N.J. Super. 367, 158 A.2d 722 (1960).

148. *Humane Society v. New Jersey State Fish & Game Council*, 129 N.J. Super. 239, 322 A.2d 841 (1974). The opinion is a good illustration of the current preoccupation with equal protection terminology, as applied to elections and office-holding, coupled with only cursory analysis of the abdication of political responsibility for public policy to agencies deliberately composed of special interest groups. This practice, very common in the states, is different from the political selection of full-time officials from members or on the recommendation of interest groups, from whom the appointee must then be formally independent, and distinct also from the due process problems common in professional licensing by boards appointed from the profession.

To transfer the choice of policy goals from elected lawmakers to the representatives of favored interest groups raises questions of legitimacy even when the standards of delegation otherwise pass muster, but these questions are related to the familiar issue of standardless delegation. Whether the procedural safeguards mentioned by Professor K.C. Davis, such as administrative articulation of policy and opportunity for interested parties to argue for their views, can substitute for a discernible legislative policy may depend on whether one sees the delegated task as umpiring or compromising between incompatible and politically contested demands, or as applying expertise to the "rational" pursuit of a generally stipulated "public interest." Compare Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969), with Jaffe, *The Illusion of the Ideal Administration*, 86

I have mentioned these issues, not to propose how to resolve them, but as examples of old and new questions that touch the legitimacy of the way we make laws, and that continue to concern us today. I hope the agenda is adequate to demonstrate that due process need not become an empty or trivial promise even if, as Justice Brandeis and some of his predecessors and at least one successor thought, there should be no "substantive due process" of any kind, even if due process asserts nothing about what laws would be made, but only how they would be made.

### V. CONCLUSION

It is not a new thought that "to guarantee the democratic legitimacy of political decisions by establishing essential rules for the political process" is the central function of judicial review, as Dean Rostow and Professor Strong, among others, have argued.<sup>149</sup> Indeed, the earliest opinions questioning the validity of laws did so by asserting either inherent limitations on the legislative function in a system of divided powers or other principles about institutions and processes. The question we have been pursuing, however, is not the legitimacy of judicial review—whether it extends to the substance of enacted policies or whether it should do no more than safeguard the democratic process. Judicial review applies to either, depending on the constitutional premises. Our inquiry has concerned what "due process" can sensibly mean as a constitutional standard for lawmaking, and not the proper scope and limits of judicial review. The legitimacy of enforcing constitutional con-

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HARV. L. REV. 1183 (1973); Grundstein, *Law and the Morality of Administration*, 21 GEO. WASH. L. REV. 265 (1953) (review of the older debates of this classic issue); Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968); and Wright, Book Review, 81 YALE L.J. 575 (1972). For a striking illustration of changing policy toward the issue, see *Florida v. Weinberger*, 492 F.2d 488 (5th Cir. 1974).

Procedural safeguards can assure rationality and fairness in policy-making, better indeed than can the legislative process itself, but they do not make up for shifting an unresolved political battle among competing social groups from a democratically elected legislature to an agency without some indication of which goals are deemed socially paramount. The practice of states (rarely of Congress) of placing the major opposing groups themselves on such a board to make policy for all citizens merely exacerbates the issue of institutional legitimacy. See Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1258-61 (1966). The most recent, thorough reexamination of these issues is Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1760-70, 1790-1803 (1975).

149. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 210 (1952); Strong, *Toward an Acceptable Function of Judicial Review?*, 11 S. DAK. L. REV. 1 (1966).



straints on the substance of policy as well as those on process is not in dispute.

What is in dispute, however, is the practice of reasoning backwards from a theory of judicial review to a theory of constitutional norms, the practice of judicial review premised on nothing more than a theory of judicial review itself. "Practical men," Holmes said in another context, generally "prefer to leave their major premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end."<sup>150</sup> We expect those who apply our constitutions to be practical men, but we do not long remain satisfied to leave their major premises inarticulate.<sup>151</sup> Even for practical purposes, constitutional theory turns out to be the most important thing in the end, as we have had more than enough occasions to find out. The preference for deriving the meaning of the Constitution from the function of judicial review, from inarticulate premises or none at all, facilitates both lawless government and lawless judicial review in the literal, not the pejorative sense of that word. A court which sees its function as weighing social and personal interests in reviewing laws under the fifth or the fourteenth amendment will likely have the same view of its function under the first amendment,<sup>152</sup> and the public as well as its governors will treat as legitimate anything that does not fail this test of judicial review. In this conventional, court-centered view of constitutional law, due process was turned into the most inarticulate of all premises for invalidating unreasonable laws.

We have explored the contrary theory that our constitutions state directives for government and for judicial review only as a consequence, a heresy occasionally held from Marshall's day through Holmes's to Black's. From that perspective, due process must carry a different meaning. Our governmental architecture,

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150. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899).

151. The practical men who drafted President Truman's steel seizure order carefully left their major premises inarticulate, Exec. Order No. 10,340, 3 C.F.R. 65 (Supp. 1952), and allowed the practical men on the bench to select the basis of legitimation, bringing about an historic decision on due process in lawmaking. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

152. Consider also the contract clause. The contrast of approach between Black's rejection of "substantive due process" and Frankfurter's and Hand's unwillingness to enforce the first amendment lies in the point that if the Constitution required laws to be reasonable, Black would accept the obligation to enforce the requirement, whether he thought it desirable or not. See *El Paso v. Simmons*, 379 U.S. 497, 517 (1965) (Black, J., dissenting on the contract clause issue).

in Holmes's metaphor, includes no directive to its occupants to make only laws that rationally serve social ends, and we do not compliment the political sense of the architects to attribute such an unusable directive to them. Despite the current interest in ways to bring the goals of law, even unpragmatic, non-purposive values, within the reach of economic and similar models of rational analysis,<sup>153</sup> there is no more basis to claim that the Constitution imposed such a view of policy-making on legislatures than that it imposed Benthamite utilitarianism, Pareto optimalism, or Herbert Spencer's Social Statics.<sup>154</sup>

What we do have is a blueprint for the due process of deliberative, democratically accountable government, with fifty statewide and numberless local variations. The design does not presuppose philosopher kings elected by philosopher constituents, free from ignorance, sloth, gluttony, avarice, short-sightedness, political cowardice and ambition; quite the contrary. It undertakes to confine political irrationality by process, not what Learned Hand called "moral adjurations." Our institutions and procedures are designed to curb power to make law capriciously, on merely personal or inarticulate impulse, without preventing the enactment of measures that can win deliberate assent, even though they cater to a selfish minority, even if they are doubtful means toward divergent goals. These processes postulate, as Learned Hand once described Holmes' view of legislation, that "a law which can get itself enacted is almost sure to have behind it a support which is not wholly unreasonable,"<sup>155</sup> but more than that: they postulate that the support itself is the crux, that the means and ends of policy remain our own responsibility, as long as constitutional boundaries are observed. For nothing I have said suggests that the power of political majorities is beyond constitutional bounds if only it is exercised by the prescribed process, or that the bounds should not be enforced. As long as we have rights that can be fairly attributed to a constitution, whether they are as mundane as limits on public spending or as precious as liberty of conscience and life itself, at least that process requires amendment of the consti-

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153. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973); and the witty commentary by Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

154. See *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 285 (1973). Leff, *supra* note 153, at 475-77, capsulizes some of the reasons that, if translated into a legislative setting, would make such a test, for legislation impossible.

155. L. HAND, *supra* note 99, at 8 (1952). See also his essay on Chief Justice Stone's Conception of the Judicial Function. *Id.* at 201.

tution itself.<sup>156</sup> But the crucial privileges and immunities that most occupy us in constitutional law gain nothing in clarity or in security by being attributed to the words in the fifth and the fourteenth amendments that promise us due process of law. Instead, the misdirection of due process to the substance of enactments diverts it from testing the process of enactment itself.

For this very reason the theory of due process we have explored is likely to remain a heresy. As a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsewhere) it is to serve many generations through changing times. But as a source of judicial review, a constitution will be called upon to judge the legitimacy of outcomes, of the concrete precipitates of the process. To judge legislation as a process, not as a product, not only drives courts toward the problems of standards and of sanctions that we have touched on, it also requires them to deny validity to some excellent enactments while sustaining deplorable ones that have been faultlessly made.

This tension between a general rule and its concrete application is unavoidable in judicial review, as in all adjudication.<sup>157</sup> Still, it has not dissuaded courts from enforcing due procedure in administrative and local government law. So perhaps the time will come once again for one of our recurrent returns to constitutional theory, and not only from sympathy for one of its most abused

156. State constitutions often include constraints against the urge of politicians to spend taxes not yet levied, so that such debts can be incurred only by constitutional amendment. The sixteenth amendment can be seen as removing a right of taxpayers previously protected by constitutional law, rightly or not, and was of course so regarded by them. The Supreme Court's decisions on religion have called forth efforts to amend the first amendment, so far unsuccessfully. But the California Supreme Court's conclusion that the death penalty was a constitutionally forbidden punishment, *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), was overturned by constitutional amendment on initiative petition. See CAL. CONST. art. I, § 27; *People v. Murphy*, 8 Cal. 3d 349, 503 P.2d 594, 105 Cal. Rptr. 138 (1972).

157. Apart from resistance against enforcing required procedures in favor of guilty defendants, this ingrained perspective of adjudication has long kept the first amendment from being read as a prohibition against making certain laws, which it is, ahead of any question of the rights of particular persons in a concrete case. See Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, 22 STAN. L. REV. 1163, 1174-86 (1970). Cf. *Lewis v. New Orleans*, 415 U.S. 130, 136 (1974) (dissenting opinion) which complains that the majority relegated the facts of defendants' conduct to footnotes. This is an entirely correct practice when the validity of the law itself is at issue,

premises.<sup>158</sup> For the last few years have reawakened our appreciation of the primacy of process over product in a free society, the knowledge that no ends can be better than the means of their achievement. "The highest morality is almost always the morality of process," Professor Bickel wrote about Watergate a few months before his untimely death.<sup>159</sup> If this republic is remembered in the distant history of law, it is likely to be for its enduring adherence to legitimate institutions and processes, not for its perfection of unique principles of justice and certainly not for the rationality of its laws. This recognition now may well take our attention beyond the processes of adjudication and of executive government to a new concern with the due process of lawmaking.

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158. It is doubtful from where the impetus for a reexamination of the recent return to substantive review will come. Forty years ago substantive due process stood in the way of state and federal social legislation that was considered desirable and justified by solid political majorities. Possibly second thoughts about the new formulas of substantive review will follow, not from the frustration and protests of legislatures, but from the predictable overenthusiastic use of these open-ended formulas by lower courts.
159. Bickel, *Watergate and the Legal Order*, 57 COMMENTARY, Jan., 1974, at 25.